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# 1326 United States 1326

### Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARY-LAND CASUALTY COMPANY, a Corporation.

Appellants,

VS.

KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the KELSO STATE BANK, Appellees.

### Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.





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Appellees.

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#### Names and Addresses of Attorneys of Record.

McCAMANT & THOMPSON, Northwestern Bank Building, Portland, Oregon, and GRINSTEAD & LAUBE, 314 Colman Building, Seattle, Washington,

For the Appellants.

A. L. MILLER, and MILLER, WILKINSON & MILLER, Vancouver, Washington, For the Appellees.

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

trict Court of the United States for the District of Oregon, an amended bill of complaint, in words and figures as follows, to wit: [4]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation, Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

#### Amended Bill of Complaint.

Come now the Fidelity & Deposit Company of Maryland, a corporation, and, before the defendant The United States National Bank of Portland (Oregon) has responded to its bill of complaint on file herein and by consent of said defendant, amends its said bill of complaint, at the request and upon the consent of the Maryland Casualty Company, by adding the said Maryland Casualty Company, a corporation, as a party complainant, and the Kelso State Bank, an insolvent banking cor-

poration, and John P. Duke, as Supervisor of Banking of the State of Washington in charge of and liquidating the assets of the Kelso State Bank, as parties defendant, and said complainants file this, their amended bill of complaint, in said case, and, for their FIRST CAUSE OF ACTION, allege:

#### T.

That, at all times hereinafter mentioned, the Fidelity & Deposit Company of Maryland was and now is a corporation organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business in the city and county of Baltimore, in said state, and that it is now and, at all of said times, has been a resident and a citizen of said state of Maryland; [5] and that it is now and, at all of said times, has been authorized to do and doing business as a Surety Company in the State of Washington, and that it has paid its annual license fee last due as such corporation.

#### II.

That, at all times hereinafter mentioned, the Maryland Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business in the city and County of Baltimore in said state, and that it is now and, at all of said times, has been a resident and a citizen of said State of Maryland; and that it is now and, at all of said times, has been authorized to do and doing business as a surety company in the State of

Washington, and that it has paid its annual license fee last due as such corporation.

#### III.

That the defendant The United States National Bank of Portland (Oregon) is now and, at all times hereinafter mentioned, has been a national banking association, organized and existing as such under the laws of the United States, and located at Portland, Multnomah County, in the State of Oregon, and an inhabitant of the district of Oregon aforesaid and a citizen of said state.

#### IV.

That the defendant Kelso State Bank is now and, at all times hereinafter mentioned, was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business in the town of Kelso, Cowlitz County, Washington, and a citizen of said state, and during said times it was authorized to, engaged in and did transact, conduct and carry on a general banking business under the laws of the state of Washington up to the time that its business, assets and affairs were taken into the possession of the Supervisor of [6] Banking of the State of Washington, as hereinafter alleged.

#### V.

That at all times hereinafter mentioned, prior to April 1st, 1921, one Claude P. Hay was the duly appointed, qualified and acting Bank Commissioner of the State of Washington, acting under and by virtue of chapter 80 of the Session Laws of 1917 of the State of Washington, being an act entitled, "AN

ACT relating to banking and trust business; the organization, regulation, management and dissolution of banks and trust companies, providing penalties and repealing certain acts and declaring an emergency': as amended by chapter 209 of the Session Laws of the State of Washington for 1919, being an act entitled, "AN ACT relating to banking and trust business, the organization, regulation, management and dissolution of banks and trust companies, relating to the office of bank commissioner, providing penalties, and amending sections 2, 3, 5, 7, 9, 15, 23, 24, 28, 33, 36, 37, 40, 47, 49, 75 and 80 of chapter 80 of the Laws of 1917"; and as amended by chapter 73 of the Session Laws of the State of Washington for 1921, being an act entitled, "AN ACT relating to the examination of banks, mutual savings banks and trust companies, and amending section 8 of chapter 80 of the Laws of 1917"; and as amended by chapter 7 of the Session Laws of the State of Washington for 1921, being an act entitled, "AN ACT relating to, and to promote efficiency, order and economy in, the administration of the government of the state. prescribing the powers and duties of certain officers and departments, defining offenses and fixing penalties, abolishing certain offices, and repealing conflicting acts and parts of acts," said law and amendments providing in part as follows:

Section 1, chapter 80, Laws of 1917.

"The governor shall, with the consent of the senate, appoint a state bank examiner, whose term of office shall be four years [7] and until his successor is appointed and qualified un-

less he be sooner removed. No person shall be appointed who is not and for two years prior to appointment has not been a citizen of this state and who has not had at least four years experience in banking, nor shall any person be eligible to, or hold such office while interested in any bank or trust company as director, officer or stockholder."

Section 59, chapter 80, Laws of 1917.

"Whenever it shall in any manner appear to the state bank examiner that any bank or trust company has violated any of the provisions of law or is conducting its business in an unsafe manner or that it refuses to submit its books, papers, or concerns to lawful inspection or that any director or officer thereof refuses to submit to examination on oath touching its concerns, or that it has failed to carry out any authorized order or direction of an examiner, the state bank examiner may give notice to the bank or trust company so offending or delinquent or whose director or officer is thus offending or delinquent to correct such offense or delinquency and, if such bank or trust company fails to comply with the terms of such notice within thirty days from the date of its issuance or within such further time as said examiner may allow, then the examiner may take possession of such bank or trust company as in case of insolvency."

Section 60, chapter 80, Laws of 1917.

"Whenever it shall in any manner appear

to the state bank examiner that any offense or delinquency referred to in the preceding section renders a bank or trust company in an unsound or unsafe condition to continue its business or that its capital or surplus is reduced or impaired below the amount required by its articles of incorporation or by this act, or that it has suspended payment of its obligations or is insolvent, said examiner may notify such bank or trust company to levy an assessment on its stock or otherwise to make good such impairment or offense or other delinquency within such time and in such manner as he may specify or if he deem necessary he may take possession thereof without notice."

Section 62, chapter 80, Laws of 1917.

"Upon taking possession of any bank or trust company, the examiner shall proceed to collect the assets thereof and to preserve, administer and liquidate the business and assets of such corporation. With the approval of the superior court of the county in which such corporation is located, he may sell, compound or compromise bad or doubtful debts and upon such terms as the court shall direct sell all real estate and personal property of such corporation. He shall deliver to each purchaser an appropriate deed or other instrument of title. If real estate is situated outside of said county. a certified copy of the orders authorizing and confirming the sale thereof shall be filed for record in the office of the auditor of the county in which such property is situated. He may appoint special deputy examiners, and other necessary agents, to assist in the administration and liquidation of such corporation, a certificate of such appointment to be filed with the clerk of the county in which such corporation is located. He shall require each special deputy to give a surety company bond, conditioned as he shall provide, the premium of which shall be paid out of the assets of such corporation. He may also employ an attorney for legal assistance in such administration and liquidation."

Section 1, chapter 209, Laws of 1919.

"The official title of the state bank examiner is hereby changed to 'bank commissioner.' The term 'state bank examiner' whenever used in the laws of this state shall be held and construed to mean the bank commissioner. The terms 'bank examiner' and 'examiner' wherever used in the laws of this state where from the context of the law is meant the state bank examiner shall be held and construed to mean the bank commissioner. \* \* \* \* ''

Section 2, chapter 7, Laws of 1921.

"There shall be, and are hereby created, departments of the state government which shall be known respectively as, \* \* \* (4) the department of taxation and examination \* \* \*; which department shall be charged respectively with the execution, enforcement, and administration of such laws, and invested

with such powers and required to perform such duties, as the legislature may provide."

Section 3, chapter 7, Laws of 1921.

"There shall be a chief executive officer of each of the departments of the state government created by this act, to be known respectively as \* \* \* (4) the director [9] of taxation and examination, \* \* \* who shall be appointed by the governor with the consent of the senate, and hold office at the pleasure of the governor: \* \* \* "

Section 49, chapter 7, Laws of 1921.

"The department of taxation and examination shall be organized into, and consist of, three divisions, to be known respectively as, (1) the division of taxation, (2) the division of banking, and (3) the division of municipal corporations. \* \* \* \* "

Section 51, chapter 7, Laws of 1921.

Section 54, chapter 7, Laws of 1921.

"The director of taxation and examination shall appoint and deputize an assistant director, to be known as the supervisor of banking, who shall have charge and supervision of the division of banking, and shall have power, with the approval of the director, to appoint and employ such deputies, examiners, inspectors, and clerical and other assistants as may be necessary to carry on the work of the division. \* \* \* "

"The director of taxation and examination shall have the power, and it shall be his duty,

through and by means of the division of banking:

- (1) To exercise all the powers and perform all the duties now vested in, and required to be performed by, the bank commissioner, \* \* \* "Section 138, chapter 7, Laws of 1921.
  - " \* \* \* this act is necessary for the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House, January 20, 1921.

Passed the Senate, January 31, 1921.

Approved by the Governor February 9, 1921." That complainants hereby include herein, as if fully set out, the full text of each and all of the acts hereinabove referred to by title.

That, on the 1st day of April, 1921, the defendant John P. Duke was duly appointed Supervisor of Banking of the State of Washington, [10] having charge and supervision of the division of banking of said state and, thereupon and upon said day, duly qualified as such and ever since has been and now is the duly appointed, qualified and acting Supervisor of Banking of the State of Washington and, as such Supervisor of Banking, under and in accordance with the said Laws of the State of Washington above cited, has succeeded to all the powers, rights and duties of said Claude P. Hay, Bank Commissioner aforesaid, and is now and, at all times herein mentioned, has been a resident of and citizen of the State of Washington.

#### VI.

That, on the 17th day of March, 1921, said Kelso State Bank, being insolvent, refused to discharge its obligations in the ordinary course of banking business, and its affairs and assets were taken into the possession of said Claude P. Hay, then Bank Commissioner of the State of Washington, for liquidation and distribution; that ever since said 17th day of March, 1921, said Claude P. Hay, as Bank Commissioner, and said defendant, John P. Duke, as Supervisor of Banking, as successor to Claude P. Hay, has been and now is in possession of the business and affairs of said Kelso State Bank for the purpose of liquidating and administering the same; that, on the 17th day of March, 1921, said Kelso State Bank was and ever since has been and now is insolvent.

#### VII.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand and no/100 (\$3000.00) dollars.

#### VIII.

That Cowlitz County is now and, at all times hereinafter mentioned, has been a municipal corporation created by the laws of the State of Washington, and a subdivision of said state, and, at all of said times, Linus Perry Brown has been and now is the [11] duly elected, qualified and acting County Treasurer of said Cowlitz County and, as such, the custodian of the funds and moneys belonging to said county, acting under and pursuant to Sections 3937, 3940 and 3943 of Remington's

1915 Codes and Statutes of Washington, being an official Code of the State of Washington, said sections providing as follows:

Section 3937. Election.—At the first election in each county, and every two years thereafter, there shall be elected a county treasurer. who shall have the qualifications of a voter, and shall continue in office for the term of two years, and until his successor is elected and qualified."

Section 3940. To receive and disburse moneys.—He shall receive all moneys due and accruing to the county and disburse the same on the proper orders issued and attested by the county auditor. Upon receipt of all moneys other than taxes he shall issue his receipt therefore (therefor) in duplicate, one of which receipts he shall deliver immediately to the person or persons making such payment, and the duplicate of such receipt must be immediately filed by such treasurer in the office of the county auditor."

"Section 3943. Moneys, how kept.-The county treasurer must keep all moneys belonging to this state, or to any county of this state, in his own possession until disbursed according to law. He must not place the same in the possession of any person to be used for any purpose; nor must he loan or in any manner use or permit any person to use the same, except as provided by law; but it shall be lawful for a county treasurer to deposit in his own

name, as county treasurer, any such moneys in any national, state or private bank or banks doing a general banking business in his county: Provided, that before any such deposit is made the bank in which it is proposed to make the same shall first give to such county treasurer a bond, with sureties to be approved by him, in such amount and with such conditions as he may require. Action may be brought on such bond either by such treasurer or by the county of which he is treasurer. But nothing done under the provisions of this section shall alter or affect the liability of any county treasurer or of the sureties on his official bond."

#### IX.

That, at all times herein mentioned, Section Seven of Article Eight of the Constitution of the State of Washington was, and now [12] is, in full force and effect, and that said Section Seven provides:

"No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

#### X.

That, at the time said Kelso State Bank was taken over by said Claude P. Hay, then Bank Commissioner of the State of Washington, for

liquidation and distribution, said Linus Perry Brown, as Treasurer of said Cowlitz County, had a balance on deposit in said bank of sixty-four thousand four hundred sixty and 96/100 (\$64,460.96) dollars of moneys belonging to said Cowlitz County, Washington, which said moneys said Linus Perry Brown, as County Treasurer of said County, had deposited in said bank, as trust funds belonging to said county, and held by him. as such trustee, which said funds said bank received with full knowledge of the trust character thereof and with full knowledge that said funds were the property of said Cowlitz County, and said funds were deposited in said bank by said Linus Perry Brown, as County Treasurer of said Cowlitz County, as trust deposits and for safe keeping only.

#### XI.

That, at all times herein mentioned, Section Eighty-one, Chapter Eighty of the Laws of Washington for 1917, was, and now is, in full force and effect; that said Section Eighty-one, of Chapter Eighty reads as follows:

"The owners or officers of any bank who shall fraudulently receive any deposit, knowing that such bank is insolvent, shall be deemed guilty of a felony and punished upon conviction thereof, by a fine not exceeding one thousand (\$1,000.00) dollars, or imprisoned in the State penitentiary not exceeding [13] ten years, or both such fine and imprisonment, at the discretion of the court."

#### XII.

That, at the times the deposits of said County funds, amounting to said sum of sixty-four thousand four hundred sixty and 96/100 (\$64,460.96) dollars were deposited in said Kelso State Bank, said bank was, ever since has been and now is hopelessly insolvent, and the officers of said bank knew, at all of said times, that said bank was hopelessly insolvent; that, on January 27th, 1921, the balance of County funds, which said County Treasurer had on deposit in said bank, was fifteen thousand eight hundred thirty-five and 34/100 (\$15,835.34) dollars; that, on said date, said Treasurer deposited in said bank three hundred ninetyseven and 90/100 (\$397.90) dollars; that said Treasurer deposited, on February 15th, 1921, in said bank, fourteen hundred fifty-three and 42/100 (\$1,453.42) dollars; on February 21st, 1921, sixteen hundred ninety-four and 37/100 (\$1,694.37) dollars; on February 28th, 1921, eighteen hundred seventyseven and 91/100 (1,877.91) dollars; on March 3d, 1921, twenty-two hundred sixty-four and 06/100 (\$2,264.06) dollars; on March 8th, 1921, six hundred eighty-seven and 73/100 (\$687.73) dollars; on March 9th, 1921, sixty-five hundred seventy-two and 55/100 (\$6,572.55) dollars; on March 14th, 1921, thirty-five thousand three hundred thirty-seven and 57/100 (\$35,337.57) dollars, and said Treasurer, from time to time, drew checks on said account, leaving in said account, on said 17th day of March, 1921, at the time said bank closed, the sum of sixty-four thousand four hundred sixty and 96/100 (\$64,-

460.96) dollars; that, at the times said deposits were received by said bank, said bank was, and for many months prior thereto had been, hopelessly insolvent. and that, at all of said times, the officers of said bank knew that said bank was hopelessly insolvent, and said bank, and the officers of said bank, wrongfully, unlawfully and fraudulently represented to said [14] Linus Perry Brown, as such Treasurer, that said bank was solvent, and said Linus Perry Brown, as such Treasurer, believed said representations and, relying thereon, was induced to and did deposit said County funds in said bank and, by reason of the wrongful, unlawful an fraudulent acts of said officers in receiving said funds, when said bank was hopelessly insolvent within the knowledge of said officers as aforesaid, the title to said County funds did not pass to said bank, but remained in said Linus Perry Brown, as Treasurer of said Cowlitz County.

#### XIII.

That, on the 14th day of March, 1921, said Kelso State Bank purchased from the defendant The United States National Bank of Portland, with said County funds which it had wrongfully, unlawfully and fraudulently received from said County Treasurer of Cowlitz County as aforesaid and which funds were, at said time, the property of said Cowlitz County, certain warrants of Diking Districts Nos. 1, 2, 4, 6, 8, 9 and 10 of Cowlitz County, Washington and certain warrants of School District No. 36 of Cowlitz County, Washington, and certain other school district warrants of school dis-

tricts in Cowlitz County, Washington, and certain drainage district warrants of drainage district No. 3 of Clarke County, Washington, and road district warrants of Road District No. 1 of Cowlitz County, Washington, and certain warrants of the city of Rainier, Washington, all of which said warrants are of the total face value of thirty-three thousand four hundred ninety-one and 59/100 (\$33,491.59) dollars; that said warrants thereby became and were the property of said Cowiltz County, Washington, and the County Treasurer of said County thereby became entitled to possession thereof; that said Kelso State Bank, after purchasing said warrants with said County funds, as aforesaid, left said warrants with the defendant The United States National Bank of Portland, to be held by said defendant The United States National Bank of [15] Portland, as trustee, for the use and benefit of said County Treasurer of Cowlitz County, to secure the deposits of County funds of said Cowlitz County which said County Treasurer had made in said Kelso State Bank, and said defendant The United States National Bank of Portland accepted said warrants, as such trustee, and agreed to hold the same for the use and benefit of said County Treasurer of said Cowlitz County, as security for County funds of Cowlitz County theretofore deposited by said Treasurer in said Kelso State Bank; that said warrants are now in the possession of said defendant The United States National Bank of Portland, and are located in its banking-house in said city of

Portland, county of Multnomah, district and state of Oregon.

#### XIV.

That, more than one year prior to the time said bank closed, said Fidelity & Deposit Company of Maryland executed two certain bonds in the penal sums of forty thousand and ten thousand dollars respectively, to said Treasurer of Cowlitz County to secure County funds deposited in said Kelso State Bank, which said bonds were executed by said Fidelity & Deposit Company of Maryland, as surety and said Kelso State Bank, as principal, in favor of said County Treasurer, as obligee, and which said bonds were in full force and effect on the day said Kelso State Bank closed; that said Fidelity & Deposit Company of Maryland, as surety on said bonds, was obliged to and did pay said County Treasurer the sum of forty-six thousand sixty-six and 06/100 (\$46,066,06) dollars as its portion of the amount which said Treasurer had on deposit in said bank at the time it closed.

That, at the time said bank closed and at all times for more than one year prior thereto, said Maryland Casualty Company was surety on a certain bond in the penal sum of twenty thousand (\$20,000) dollars, which said bond was executed by said Maryland [16] Casualty Company, as surety, and said Kelso State Bank, as principal, in favor of said Linus Perry Brown, as Treasurer of said Cowlitz County, as obligee, to secure deposits of County funds of said Cowlitz County in said Kelso State Bank, and that said Maryland Cas-

ualty Company, as surety on said bond, was obliged to and did pay said County Treasurer as its portion of the amount which said Treasurer had on deposit, when said bank closed, the sum of eighteen thousand four hundred twenty-six and 43/100 (\$18,426.43) dollars.

That the amount so paid said County Treasurer by said complainants included thirty-one and 53/100 (\$31.53) dollars interest, in addition to the amount which said Treasurer had on deposit in said bank at the time it closed.

#### XV.

That, upon the payment of said amounts to said County Treasurer as aforesaid, said complainants became subrogated to all right, title and interest of said County Treasurer and of said Cowlitz County in and to said moneys and in and to all property and assets of said bank, which had been purchased with said moneys, and in and to all collateral or other security which said Kelso State Bank had deposited with said The United States National Bank of Portland, as trustee, or with said County Treasurer or with anyone else, as security for said deposits in said Kelso State Bank, and became subrogated to all actions and causes of actions, claims and demands, which said County Treasurer had, or might have, against said Kelso State Bank, or against any other person to recover the same, and said Linus Perry Brown, as County Treasurer of Cowlitz County, assigned to said complainants all the right, title and interest of said County Treasurer and of said Cowlitz County in and to said

moneys and said assets, and authorized and empowered said complainants to recover the same; [17] that, upon payment of said sums to said County Treasurer as aforesaid, complainants became, and now are, the owners of said warrants in the possession of the defendant The United States National Bank of Portland and became, and now are, entitled to the possession thereof.

#### XVI.

That said warrants hereinabove mentioned are particularly described in a certain receipt signed by said defendant The United States National Bank of Portland, on the 14th day of March, 1921, being No. 1469, a copy of which said receipt is now in the possession of said defendant The United States National Bank of Portland, and the original of which said receipt is in the possession of the defendant Kelso State Bank, and said defendant John P. Duke, as Supervisor of Banking; that said receipt is hereby referred to for a description of said warrants and is, by this reference, made a part hereof as though particularly set forth herein.

#### XVII.

That complainants have demanded of said defendant The United States National Bank of Portland, possession of said warrants, but that said defendant The United States National Bank of Portland has, at the instance and request of said defendants, Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington, refused to deliver said warrants to complainants and threatens to and will, unless enjoined and restrained from so

doing by this Honorable Court, deliver said warrants to said defendants Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington, and said warrants will thereby be removed from the State of Oregon and taken beyond the jurisdiction of this court, thereby causing immediate and irreparable injury, loss and damage to complainants.

#### XVIII.

That said defendants Kelso State Bank and John P. Duke, as [18] Supervisor of Banking in charge of and liquidating the assets of said Kelso State Bank, claim some interest and ownership in said warrants and claim that they are entitled to the possession thereof, but that said claims are invalid and without right, and that neither of said defendants, nor any other person than complainants, have any right, title or interest in or to said warrants, or any of them, or any right to the possession thereof.

And, for a SECOND CAUSE OF ACTION against the defendants Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington, in charge of and liquidating said Kelso State Bank, complainants allege:

I.

Repeat and incorporate herein paragraphs one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, fourteen and fifteen of the first cause of action herein.

#### II.

That at the time said Kelso State Bank closed its doors and was taken over by the Supervisor of Banking of the State of Washington as aforesaid, there was cash on hand in said bank in the amount of seventeen thousand six hundred forty-one and 64/100 (\$17,641.64) dollars, which said amount passed into the hands of said Supervisor of Banking of the State of Washington; that said sum of seventeen thousand six hundred forty-one and 64/100 (\$17,641.64) dollars was a portion of the County funds of said Cowlitz County, which said Linus Perry Brown, as Treasurer of Cowlitz County, Washington, had deposited in said bank when the same was insolvent within the knowledge of its officers as aforesaid, and were trust funds and the property of said Cowlitz County: that complainants herein are now the owners of said cash which passed into the hands of said Supervisor of Banking as aforesaid, and are entitled to recover the same in full; that said defendants Kelso State Bank and John P. Duke, as [19] Supervisor of Banking of the State of Washington, have refused to turn said funds over to complainants, or to deliver up possession thereof, although demand therefor has been made.

And, for a THIRD CAUSE OF ACTION against the defendants Kelso State Bank, a corporation, and John P. Duke, as Supervisor of Banking of the State of Washington in charge of and

liquidating the assets of the Kelso State Bank, complainants allege:

I.

Repeat and incorporate herein paragraphs one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, fourteen and fifteen of the first cause of action herein.

## II.

That, of said moneys so deposited by said County Treasurer, as set forth in paragraph twelve of the first cause of action herein set forth, in the total sum of sixty-four thousand four hundred sixty and 96/100 (\$64,460,96) dollars, the sum of thirty-three thousand four hundred ninety-one and 59/100 (\$33,-491.59) dollars was used by said Kelso State Bank for the purchase of the warrants referred to and described in the first cause of action hereinabove set forth; and the sum of seventeen thousand six hundred forty-one and 64/100 (\$17,641.64) dollars was retained by and remained in the possession of the Kelso State Bank up to and including the 17th day of March, 1921, and passed into the possession of the Bank Commissioner and thereafter into the possession of the defendant John P. Duke, as Supervisor of Banking in charge of and liquidating said defendant Kelso State Bank; and that the remainder, being the sum of thirteen thousand three hundred twenty-seven and 73/100 (\$13,327.73) dollars, was invested by the Kelso State Bank in other assets, which assets so purchased were in the possession of the Kelso State Bank at the time said Bank passed into the hands of the Bank Commis-

sioner and thereafter into the hands of the defendant [20] John P. Duke, as Supervisor of Banking in charge of and liquidating the said defendant Kelso State Bank; that your complainants are not informed as to the particular description or descriptions of the assets so purchased with said funds so deposited by the County Treasurer; that said assets so purchased were, at all times, the property of and belonged to Cowlitz County and, upon payment by complainants herein of the amount of said deposits, by virtue of complainants' relation as upon the depository bonds, all as set forth fourteen of said first paragraph action, your complainants became entitled ofto and the owners of said assets so purchased sum of thirteen thousand the said three hundred twenty-seven and 73/100 \$13,327.73) dollars; that, in order to determine the description or descriptions of said assets so purchased with said sum of thirteen thousand three hundred twenty-seven and 73/100 (\$13,327.73) dollars, it is necessary that the defendants Kelso State Bank and said John P. Duke, as said Supervisor of Banking, render an accounting of the disposition made of said sum of thirteen thousand three hundred twenty-seven and 73/100 (\$13,327.73) dollars, and furnish a description or descriptions of the assets so purchased with said sum, or any portion or portions thereof, and that, in event said accounting cannot be made in the full amount of thirteen thousand three hundred twenty-seven and 73/100 (\$13,-327.73) dollars, that plaintiffs are entitled to a deeree adjudging that the defendants Kelso State Bank and said John P. Duke, as such Supervisor of Banking, are indebted to the complainants herein in the amount of any sums not so accounted for by assets in their possession; and that, as to any such decree of indebtedness, complainants are entitled that the same shall provide that the amount of such decree shall constitute a preferred claim, prior to the claims of any general creditors of said Kelso State Bank, and that said decree should direct the defendant John P. Duke, as such Supervisor of Banking, to pay the same prior to the [21] payment of any general creditors of said Kelso State Bank.

# WHEREFORE, complainants pray:

- 1. That, upon the hearing of the motion for a temporary injunction, the defendant The United States National Bank of Portland be enjoined, during the pendency of this action, from delivering any of the warrants referred to in the first cause of action herein to the defendants Kelso State Bank or John P. Duke, as Supervisor of Banking of the State of Washington, or to anyone else excepting complainants herein.
- 2. That a decree issue from this Honorable Court that the said warrants referred to in the first cause of action hereinabove set forth are the property of the complainants and directing the said defendant The United States National Bank of Portland forthwith to deliver said warrants to complainants herein; and that, the said defendants Kelso State Bank and John P. Duke, as Supervisor

of Banking of the State of Washington, have no right, title or interest therein or thereto.

- 3. That a decree issue from this Honorable Court adjudging that complainants are the owners of all funds in the possession of the Kelso State Bank, at the time it was taken into the possession of the Bank Commissioner of the State of Washington, and directing the defendant John P. Duke, as Supervisor of Banking of the State of Washington to deliver such sum to the complainants herein.
- That the defendants Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington, be required to account herein as to the disposition made by said Kelso State Bank of the remainder of the funds deposited in said Bank by said Linus Perry Brown, as County Treasurer of Cowlitz County, and as to the assets purchased with such remainder of said deposits [22] and that, as to any assets revealed and disclosed by such accounting, the same be decreed to be the property of the complainants herein, and that the defendant John P. Duke, as Supervisor of Banking of the State of Washington, be directed forthwith to deliver such assets to the complainants herein; and that, as to any portion of said funds so deposited by said County Treasurer and not shown to be in the assets disclosed to the Court and in the possession of said defendant John P. Duke, as Supervisor of Banking of the State of Washington, the complainants be adjudged to be creditors of the said Kelso State Bank in such amount; and that said defendant John P. Duke, as Supervisor of

Banking of the State of Washington, be ordered and directed to pay such amounts to complainants as a prior and preferred claim before the payment of any claims of general creditors of said Kelso State Bank.

5. That the decree herein provide that the complainants recover their costs and disbursements, to be taxed as provided by law.

6. That complainants have such other and further relief as to this Honorable Court may seem just and equitable in the premises.

LOREN GRINSTEAD, GRINSTEAD & LAUBE, Solicitors for Complainants.

State of Washington, County of King,—ss.

Personally appeared before the undersigned authority, a notary public in and for the State of Washington, Loren Grinstead, as attorney in fact for the Fidelity & Deposit Company of Maryland, a corporation, one of the complainants in the [23] foregoing bill in the above cause, who, being duly, sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and, as to those matters, he believes them to be true.

[Seal] WILLIAM T. LAUBE,

Notary Public in and for the State of Washington, Residing at Seattle.

Filed September 26, 1921. G. H. Marsh, Clerk. [24]

AND AFTERWARDS, to wit, on the 26th day of November, 1921, there was duly filed in said court, an answer of Kelso State Bank to the amended bill of complaint, in words and figures as follows, to wit: [25]

In the District Court of the United States, for the District of Oregon.

IN EQUITY.—No. E—8573.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation. Complainants.

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND, (OREGON), a Corporation. and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE. as Supervisor of Banking of the State of Washington in Charge of and Liquidating the Assets of the Kelso State Bank.

Defendants.

# Answer to Amended Bill of Complaint.

Come now the defendants the Kelso State Bank. an insolvent banking corporation, and John P. Duke as Supervisor of Banking of the State of Washington in charge of and liquidating the assets of the Kelso State Bank and for answer to the amended bill of complaint herein admit, deny and allege as follows:

I.

These defendants admit paragraphs I, II, III, IV and V of the amended bill of complaint.

II.

Answering paragraph VI these defendants admit that the said Kelso State Bank was on the 17th day of March, 1921, taken possession of by the banking department of the State of Washington for the purpose of liquidation, but these defendants allege that the affairs of said bank are now being liquidated by T. H. Adams, Special Deputy Supervisor of Banking of the State of Washington Liquidating the Kelso State Bank. [26]

III.

These defendants admit paragraphs VII, VIII and IX of the amended bill of complaint herein.

IV.

Answering paragraph X of the amended bill of complaint herein these defendants admit that at the time the said Kelso State Bank was taken over by Claude P. Hay, Bank Commissioner, on the 17th day of March, 1921, that Linus Perry Brown, County Treasurer of Cowlitz County, Washington, had a balance on deposit in said bank of \$64,460.96, but these defendants deny all of the other matters and things alleged in said Paragraph X.

Further answering paragraph X these defendants allege that Section 5072 of Remington's Codes & Statutes of the State of Washington requires each

county treasurer to designate one or more banks as depositaries of public funds held and required to be kept by him as such treasurer.

Section 5073 of the said Code provides that the bank so designated shall furnish a bond to be approved by the County Commissioners as security for moneys deposited at the bank.

Section 5074 of said Code provides that the bank so designated shall enter into an agreement to pay to the County two per centum per annum on the average daily balances of all moneys so deposited by such county treasurer, interest payments to be made monthly.

Section 5075 of the Code provides that the treasurer shall deposit the money coming into his hands as such treasurer with the banks complying with the requirements of the sections previously quoted. [27]

That said Linus Perry Brown as said County Treasurer had designated the Kelso State Bank as one of the depositaries of public funds of the County and the bond was furnished and approved by the County Commissioners as security for the funds so deposited and the moneys deposited in the said Kelso State Bank by the said Linus Perry Brown as County Treasurer were deposited under and in pursuance of the provisions of law as herein set forth, and not otherwise.

# V.

These defendants admit paragraph XI of the amended bill of complaint.

## VI.

Answering paragraph XII of the amended bill of complaint these defendants admit that during his term of office as such County Treasurer said Linus Perry Brown was carrying a checking balance with said Kelso State Bank and was from time to time making deposits with said bank and checking against the account, and these defendants admit that on the 27th day of January, 1921, there was a balance to the credit of the County Treasurer with said bank amounting to the sum of \$15,835.34, and that on said date said treasurer deposited with said bank \$397.00; and that on February 15, 1921, he deposited with said bank \$1453,42; and that on February 21, 1921, he deposited with said bank \$1694.37; and that on February 28, 1921, he deposited with said bank \$1877.91; and that on March 3d, 1921, he deposited with said bank \$2264.06; and that on March 8th, 1921, he deposited with said bank \$687.73; and that on March 9th, 1921, he deposited with said bank \$6572.55; and that on March 14th, 1921, he deposited with said bank \$35,337.57. [28]

That on January 27, 1921, he checked against the account then on deposit with the Kelso State Bank \$16.47; on January 31, 1921, he checked against said account \$51.00; on February 1, 1921, he checked against said account \$6.50; on February 5, 1921, he checked against said account \$84.68; on February 7, 1921, he checked against said account \$1.90; on February 8, 1921, he checked against said account \$46.50; on February 9, 1921, he checked

against said account \$147,50; on February 11, 1921, he checked against said account \$47.84: on February 15, 1921, he checked against said account \$42.00; on February 21, 1921, he checked against said account \$35,00; on February 23, 1921, he checked against said account \$0.89; on February 24, 1921, he checked against said account \$238.34; on February 25, 1921, he checked against said account \$62.40; on February 26, 1921, he checked against said account \$40.00; on February 28, 1921, he checked against said account \$3.49; on March 1st, 1921, he checked against said account \$7.50; on March 2d. 1921, he checked against said account \$0.70; on March 3d, 1921, he checked against said account \$125.00; on March 5th, 1921, he checked against said account \$7.50; on March 11th, 1921, he checked against said account \$14.50; on March 14th, 1921, he checked against said account \$33,10—leaving a balance on deposit to his credit in the sum of \$64,460.96,

As to the other matters and things alleged and set forth in said paragraph XII these defendants deny each and every allegation thereof.

# VII.

Answering paragraph XIII of the amended bill of complaint herein these defendants deny each and every allegation therein contained, except that these defendants admit that the United States National Bank of Portland, Oregon, one of the defendants herein, is now in the possession of certain warrants, but these defendants allege that said bank is holding said warrants in trust for the Kelso State Bank and not otherwise. [29]

#### VIII.

These defendants admit paragraph XIV of the amended bill of complaint herein.

#### TX.

These defendants deny all of the matters and things alleged in paragraph XV of the amended bill of complaint, and the whole thereof.

#### X.

These defendants deny paragraph XVI of the amended bill of complaint herein.

#### XI.

Answering paragraph XVII these defendants admit that demand has been made upon the defendant, the United States National Bank of Portland for the delivery of said warrants to the Supervisor in charge of the Kelso State Bank; as to the other matters and things set forth in said paragraph XVII these defendants deny the same.

For answer to the second cause of action in the amended bill of complaint these defendants deny and allege as follows:

# I.

These defendants deny each and every allegation contained in the second cause of action, and the whole thereof. [30]

For further defense these defendants allege:

# I.

That for a long time prior to January 27, 1921, the Kelso State Bank had been engaged in the business of banking at Kelso, Washington, doing a general banking business; that numerous persons had from time to time deposited money with the

bank and issued checks and among other depositors was the Treasurer of Cowlitz County who was depositing money with the bank as other depositors, and checking against it, using the deposit as a general checking account.

#### II.

That on January 27, 1921, there was a balance of deposits as shown by the records of the bank amounting to the sum of \$216,090.44; that thereafter and between the 27th day of January, 1921, and the 17th day of March, 1921, when the bank was closed, there was deposited by various persons a total sum of \$352,871.21, a portion of which was deposited by the County Treasurer of said Cowlitz County; that during said time checks were drawn against such deposits to the amount of \$325,219.88.

### III.

That all of the funds so deposited by the said Linus Perry Brown as County Treasurer of Cowlitz County, Washington, was commingled with the funds deposited by other customers of the bank and became a part of the general balance of the bank. [31]

For answer to the third cause of action contained in the amended bill of complaint these defendants deny and allege, as follows:

# I.

These defendants deny each and every allegation contained in the third cause of action and the whole thereof.

As a further defense to said third cause of action these defendants allege:

#### I.

That for a long time prior to January 27, 1921, the Kelso State Bank had been engaged in the business of banking at Kelso, Washington, doing a general banking business; that numerous persons had from time to time deposited money with the bank and had issued checks and among other depositors was the Treasurer of Cowlitz County who was depositing money with the bank as other depositors, and checking against it, using the deposit as a general checking account.

#### II.

That on January 27, 1921, there was a balance of deposits as shown by the records of the bank amounting to the sum of \$216,090.44; that thereafter and between the 27th day of January, 1921, and the 17th day of March, 1921, when the bank was closed, there was deposited by various persons a total sum of \$352,871.21, a portion of which was deposited by the County Treasurer of said Cowlitz County; that during said time checks were drawn against such deposits to the amount of \$325,219.88.

### III.

That all of the funds so deposited by the said Linus Perry Brown as County Treasurer of Cowlitz County, Washington, was commingled with the funds deposited by other customers of the bank and became a part of the general balance of the bank. [32]

For a further and separate answer to the amended bill of complaint herein these defendants allege:

I.

That the Kelso State Bank was a corporation organized under and by virtue of the laws of the State of Washington and engaged in the banking business at Kelso, Washington, until the 17th day of March, 1921, when it became unsound and in an unsafe condition to continue business and was taken charge of by the Supervisor of banking of the State of Washington for liquidation and is now in course of liquidation in charge of T. H. Adams, Special Deputy Supervisor of Banking of the State of Washington.

#### II.

That during the time mentioned and referred to in the bill of complaint herein for several years prior thereto one F. L. Stewart was employed as the Cashier of the Kelso State Bank and entrusted with the general management of the affairs of the bank and given control and possession of the funds, securities and properties of the bank; that from time to time the said F. L. Stewart juggled the accounts, misused and appropriated the funds of the bank, misused and mismanaged the assets of the institution and loaned the funds of the bank to irresponsible persons and by reason thereof the bank became unsound and the supervisor of Banking of the State of Washington took charge for the purpose of liquidating the affairs of the bank, and that during such time and at [33] the time the deposits were made by the County Treasurer of Cowlitz County with the said Kelso State Bank the directors and other officers of the bank had no

actual knowledge that the funds of the bank had been appropriated and embezzled by the cashier, and had no actual knowledge that the bank had become unsound or in an unsafe condition to continue business.

#### III.

That at the time the deposits were made by the Treasurer of Cowlitz County the bank was in substantially the same financial condition it had been in for a long time prior thereto and was carrying on a regular banking business without contemplating any insolvency proceedings or any action towards liquidation of the affairs of the bank and if the Bank Commissioner had not taken charge of the bank for liquidation the bank would still be running with but little if any difference in its condition.

## IV.

That under the laws of the State of Washington moneys deposited by the County Treasurer with the Kelso State Bank became the property of the bank and established the relation of debtor and creditor between the County Treasurer and the Kelso State Bank.

# V.

That during the time mentioned in the amended bill of complaint herein money was deposited by the County Treasurer of Cowlitz County with the Kelso State Bank, as alleged in the amended complaint, the bank was [34] engaged in a general banking business in Kelso and was receiving deposits from various customers and the total amount deposited during such time amounted to the sum of \$352,871.21, against which checks were drawn amounting to the sum of \$325,219.88, and all the funds and cash deposited by the said County Treasurer during the time alleged was commingled with the assets and moneys of the bank.

#### VI.

That subsequent to the 17th day of March, 1921. and while said bank was in the hands of the banking department of the State of Washington for liquidation the plaintiff the Fidelity & Deposit Company of Maryland presented to the officer in charge of the bank its claim for \$46,066.06, being the amount which it paid to the County Treasurer and being the sum for which the said plaintiff was liable under its bonds to the County Treasurer for funds deposited with the said Kelso State Bank, which said claim was duly allowed by the officer in charge of the bank as a general claim entitling the said plaintiff to dividends from the assets of the bank, to be paid in course of liquidation, which said claim was duly approved and allowed as a general claim by the Superior Court of Cowlitz County, Washington, and such claim so presented included all of the money for which the said plaintiff became responsible on account of its liability to the County treasurer on its bond, and is the same liability for which the said plaintiff seeks to recover the warrants mentioned and referred to in the amended bill of complaint herein; [35]

That subsequent to the 17th day of March, 1921, and while the said bank was in charge of the banking department of the State of Washington for

liquidation the plaintiff the Maryland Casualty Company presented its claim to the officer in charge of the bank for the sum of \$18,426.43, being the amount which it paid to the County Treasurer and being the sum for which the said plaintiff was liable under its bond to the County Treasurer for funds deposited with the Kelso State Bank. which said claim was duly allowed by the officer in charge of the bank liquidating its funds as a general claim entitling the plaintiff to dividends from the assets of the bank, to be paid in course of liquidation, which said claim was duly presented and allowed as a general claim by the Superior Court of Cowlitz County, Washington, and such claim so presented included all of the money for which the said plaintiff became responsible on account of its liability to the County Treasurer on its bond and is the same liability for which said plaintiff seeks to recover the warrants mentioned and referred to in the amended bill of complaint herein, and these defendants allege that plaintiffs have presented their claims officers liquidating the affairs of the bank, and said claims having been regularly allowed and notice thereof given to the plaintiffs, that plaintiffs have elected to continue the relation of debtor and creditor established by the general deposits of the Treasurer with the said bank and are now estopped from alleging or claiming any title to the warrant alleged to have been purchased with the proceeds from deposits made by the County Treasurer. [36]

## VII.

That on or about the 20th day of September, 1920, the United States National Bank of Portland. Oregon, one of the defendants herein, loaned to the said Kelso State Bank the sum of \$7988.12 at an agreed rate of interest of seven per cent per annum, and received as collateral security therefor certain warrants, being the warrants in controversy in this action, and now in possession of the defendant the United States National Bank of Portland, a list of the warrants being attached to the answer and counterclaim of the defendant the United States National Bank of Portland herein: that thereafter certain of said warrants. amounting to the sum of \$374.50 were paid and credited of like amount given upon the loan mentioned.

### VIII.

That on or about the 6th day of December, 1920, the United States National Bank of Portland, Oregon, one of the defendants herein, loaned to the said Kelso State Bank the sum of \$26,783.76 at an agreed rate of interest of seven per cent per annum, and received as collateral security for said loan certain warrants, being the warrants in controversy in this suit and a list of which is attached to the answer and counterclaim of the said defendant herein, the United States National Bank of Portland; that thereafter certain of said warrants were paid amounting to the sum of \$905.79 and credit for that amount given upon the loan.

#### IX.

That on the 14th day of March, 1921, there was due and owing from the Kelso State Bank to the defendant the United States National Bank of Portland, Oregon, on account of the principal and loan of the 9th day of September, 1920, hereinbefore referred to, the sum of \$7613.62 and \$50.32 interest, or a total of \$7663.95; and there was due on account of the second loan above mentioned the principal sum of \$25,877.97 and interest in the sum of \$191.24 or a total of \$26,069.21; that on said 14th day of March, 1921, the said Kelso State Bank paid from the general funds of the bank all of the principal and interest then due upon both of said loans and the debts were cancelled and the liabilites ceased; that said warrants were left in the temporary custody of the defendant the United States National Bank of Portland by the said Kelso State Bank, the liability for which said warrants were deposited as collateral security having been fully satisfied and paid and the said Kelso State Bank was entitled to the said warrants upon demand.

# X.

That after the bank was taken charge of by the officers of the banking department of the State of Washington demand was made for said warrants but the defendant the United States National Bank of Portland herein has refused to deliver the same to these defendants. [38]

WHEREFORE these defendants pray that the plaintiffs take nothing and that their amended bill

of complaint be dismissed, that the claim of the United States National Bank of Portland to the said warrants be denied, and that the defendant the United States National Bank of Portland be ordered to deliver the said warrants to these defendants to be administered upon and disposed of as a part of the assets of the Kelso State Bank. and that these defendants have such other, further and different relief as shall seem proper to a court of equity, and for their costs and disbursements herein.

# MILLER, WILKENS & MILLER,

Attorneys for Defendants Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke as Supervisor of Banking of the State of Washington in Charge of and Liquidating the Assets of the Kelso State Bank.

State of Washington, County of Clarke,—ss.

T. H. Adams, being first duly sworn, doth say on his oath: That he is the Special Deputy Supervisor of banking of the State of Washington liquidating the Kelso State Bank, that he has read the foregoing Answer to Amended Bill of Complaint, knows the matters and things herein stated and that the same is true as he verily believes.

T. H. ADAMS.

Subscribed and sworn to before me this 16th day of November, A. D. 1921.

L. CLARKE McCOY,

Notary Public, Residing at Vancouver, Washington.

My Commission expires Oct. 14, 1925.

Filed November 26, 1921. G. H. Marsh, Clerk. [39]

AND AFTERWARDS, to wit, on the 28th day of December, 1921, there was duly filed in said court a reply to the answer of the Kelso State Bank, in words and figures as follows, to wit: [40]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation, Complainants,

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a Corporation, et al.,

Defendants.

Reply to Answer of the Defendants Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, etc.

Come now the above-named complainants Fidelity & Deposit Company of Maryland, a corporation, and Maryland Casualty Company, a corporation, and, for their reply to the answer of the defendants Kelso State Bank, an insolvent banking corporation, and John P. Duke, as Supervisor of banking of the

State of Washington in charge of and liquidating the assets of the Kelso State Bank on file herein, admit, deny and allege as follows:

I.

Replying to the affirmative matter contained in paragraph two of said answer, complainants allege that T. H. Adams, as Special Deputy Supervisor of Banking of the state of Washington, is assisting John P. Duke, as Supervisor of Banking of the State of Washington, in the administration and liquidation of the Kelso State Bank. That said T. H. Adams was appointed pursuant to the provisions of Section 62, of Chapter 80, of the Session Laws of 1917 of the State of Washington, as amended by Chapter 209 of the Session Laws of the State of Washington for 1919, and as amended by Chapter 7, of the Session Laws of the State of Washington for 1921, all of which said laws are specifically pleaded in the amended bill of complaint herein, and that the duties of said T. H. Adams, as such Special Deputy Supervisor of Banking, are as defined in said laws, [41] and not otherwise. Deny each and every affirmative allegation in said paragraph two contained, not hereinbefore specifically admitted.

# II.

Replying to paragraph four of said answer, complainants allege that Sections 5072–3–4–5 and 6, of Remington's Codes and Statutes of the State of Washington, of 1915, read as follows, and not otherwise:

"Section 5072. Designation of Depositary by County Treasurer.—Each county treasurer in this state shall on the first day of July, 1907, and annually on the second Monday in January thereafter, and at such other times as he may deem necessary, designate one or more banks in the state as depositary or depositaries of all public funds held and required to be kept by him as such treasurer, and such designation or designations shall be in writing, and the same shall be filed with the board of county commissioners of his county, and no county treasurer shall deposit any public money in banks except as herein provided."

"Section 5073. Bond—Approval Securities in Lieu of.—Before any such designation or designations shall become effectual and entitle the said treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten days after such designation or designations have been filed, file with the county clerk of such county a surety bond to such county treasurer, properly execute by some reliable surety company qualified under the laws of this state to do business therein, in the maximum amount of deposits designated by said treasurer to be carried in such bank or banks, conditioned for the prompt and faithful payment thereof on checks drawn by such treasurer, which bond must be approved by the chairman of the board of county commissioners, the prosecuting at-

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torney and the county treasurer, or any two of such officers of said county, before being filed with the county clerk, and unless so approved the same shall not be received or filed by the county clerk: Provided, that said depositary or depositaries may deposit with the county treasurer good and sufficient municipal, school district, county or state bonds or warrants. United States bonds, first mortgage railroad bonds listed on the New York stock exchange, or local improvement bonds or warrants whose legality have been passed upon favorably by the supreme court, or public utility bonds or warrants issued by or under the authority of any municipality of the state for water, power or light plants or maintenance [42] thereof upon which principal or interest is not in default at the time of such deposit, the aggregate market value of which shall not be less than the amount required in said deposit, in lieu of the surety bond herein provided for.

"Section 5074. Contract as to Interest.—
Before any such designation or designations shall become effectual and entitle said treasurer to make deposits as hereinabove provided, the bank or banks so designated shall also enter into a written contract with the county whose treasurer is to make such deposits, to pay to said county, to be credited to the county expense fund thereof two per centum per annum on the average daily balances of all moneys so

deposited by such county treasurer in said bank while acting as such depositary; such payments to be made monthly to said county while such deposits continue in such depositary; said contract shall be in such form as shall be approved by the board of county commissioners and the prosecuting attorney of said county.

"Section 5075. Funds on Deposit Deemed to be in Treasury.—The county treasurer shall deposit with any depositary or depositaries which have fully complied with all requirements as herein provided, any county moneys in his hands or under his official control, and for the purpose of making the quarterly settlement and counting funds in the hands of the treasurer any such sums so on deposit shall be deemed to be in the county treasury.

"Section 5076. Liability of Treasurer.— The provisions of this chapter shall in no way relieve or release the county treasurer from any liability upon his official bond as such treasurer, or any surety upon such bond, and shall in no way affect the duty of the several county treasurers of this state to give the bond as such treasurer now required by law."

Complainants further allege that under the constitution of the State of Washington, to wit: under the provisions of Section 7 of Article 8 of said Constitution, the moneys deposited in said Kelso State Bank by the County Treasurer of Cowlitz County did not become general deposits, but were

so deposited as special deposits and for safe keeping only.

These complainants further admit that Linus Perry Brown had designated the Kelso State Bank as one of the depositaries of [43] public funds of Cowlitz County, and that the bond was furnished and approved by the County Commissioners as security for the funds so deposited by said Treasurer in said Kelso State Bank.

These complainants deny each and every other allegation in said paragraph four not hereinbefore specifically admitted.

## III.

Replying to paragraph seven of said answer, complainants deny that the United States National Bank of Portland is holding said warrants in trust for the Kelso State Bank and deny that said Bank is holding them in any capacity other than as alleged in the amended bill of complaint herein.

Replying to the further defense to the second cause of action set out in said answer, complainants admit, deny and allege as follows:

I.

Deny each and every allegation in paragraphs one, two and three of said further defense, except that complainants admit that, for a long time prior to January 27th, 1921, the Kelso State Bank had been engaged in the business of banking at Kelso, Washington, doing a general banking business.

Relying to the further defense to the third cause of action contained in said answer, complainants admit, deny and allege as follows:

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Admit the allegations of paragraph one thereof, except that complainants deny that the Treasurer of Cowlitz County was depositing money as other depositors, or otherwise than as alleged in the amended bill of complaint herein, and deny that said Treasurer was using the deposits as a general checking account or otherwise than as alleged in said amended bill of complaint. [44]

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Deny each and every allegation in paragraphs two and three of said further answer to said third cause of action.

Replying to the further and separate answer to the amended bill of complaint set out in said answer, complainants admit, deny and allege as follows:

I.

Replying to paragraph one thereof, complainants admit that the Kelso State Bank was a corporation organized under and by virtue of the laws of the state of Washington and engaged in the banking business at Kelso, Washington, until the 17th day of March, 1921, and admit that, on said date, it was unsound and in an unsafe condition to continue business. Deny each and every other allegation in said paragraph one contained and in that behalf allege that on said 17th day of March, 1921, said Kelso State Bank was taken charge of by Claude P. Hay, as Bank Commissioner of the state of Washington, as alleged in the amended bill of complaint herein, and that on or about the first

day of April, 1921, John P. Duke, as Supervisor of Banking of the state of Washington succeeded said Claude P. Hay, as Bank Commissioner of said state, and on said date took charge of said bank as such Supervisor of Banking of the state of Washington, as alleged in the amended bill of complaint herein, and that T. H. Adams, as Special Deputy Supervisor of Banking of the state of Washington, is assisting said John P. Duke, as Supervisor of Banking of said state in the administration and liquidation of said bank.

#### II.

Replying to paragraph two of said further and separate answer, complainants admit that during the time mentioned and referred to in the amended bill of complaint herein, and for several [45] years prior thereto, one F. L. Stewart was employed as cashier of the Kelso State Bank. Deny each and every allegation in said paragraph two contained, not hereinbefore specifically admitted.

### TII.

Deny each and every allegation in paragraphs three, four and five of said further and separate answer, except complainants admit that during the time mentioned in the amended bill of complaint herein the Kelso State Bank was engaged in a general banking business in Kelso, Washington.

### IV.

Replying to paragraph six of said further and separate answer, these complainants admit that on or about the 25th day of April, 1921, they presented

to the officer in charge of the Kelso State Bank their respective claims, and in that behalf allege that a true and correct copy of the claim so presented by the Fidelity & Deposit Company of Maryland is hereto attached, marked Exhibit "A" and made a part hereof, and that a true and correct copy of the claim so presented by the Maryland Casualty Company is hereto attached, marked Exhibit "B" and made a part hereof.

Complainants deny said claims were presented as general claims, or otherwise, than as stated in said claims and deny said claims were allowed by the Supervisor of Banking as general claims, or otherwise, than as therein stated.

Complainants deny that said claims were approved and allowed as general claims by the Superior Court of Cowlitz County, Washington, and in that behalf allege that there is no law of the state of Washington requiring claims to be approved by the Superior Court of Cowlitz County, or by any court, and that if said claims were approved and allowed as general claims by the Superior Court the approval and allowance of the same were made without notice to these complainants, and that said Court, in so approving and allowing [46] the same as general claims, was without jurisdiction.

Complainants further allege that at the time said claims were presented by said complainants to the officer in charge of said Kelso State Bank, said complainants did not have any knowledge that the moneys of said County Treasurer had been de54

posited in said bank when the same was insolvent and did not have any knowledge that said moneys or assets purchased with the same passed into the hands of said Supervisor of Banking and did not have any knowledge that the warrants described in the amended bill of complaint herein were purchased with said moneys and had no knowledge that said warrants were deposited with the defendant United States National Bank of Portland as security for the deposits of said County Treasurer, all as alleged in the amended bill of complaint herein. That the officer in charge of said defendant Kelso State Bank knew at the time said claims were presented that said complainants did not have knowledge of any of the facts herein set forth.

Complainants further allege that the presentation of said claims in the manner and form in which the same were presented did not, in any manner, prejudice the rights of said defendants, or the rights of any of the creditors of said Kelso State Bank and that said defendants did not, in any manner, change their position on account of said claims being presented in the manner and the form in which they were presented. That in presenting said claims said complainants did not elect to establish or continue the relation of debtor and creditor between themselves and said defendants, but set forth in such claims such facts as were, at said time, within their knowledge for the purpose of having such relief as they might by law be entitled to.

These complainants further allege that, immediately upon ascertaining facts other than those stated in said claims, as hereinabove set forth and as alleged in the amended bill of complaint [47] herein, they immediately notified said defendants thereof and that at the same time notified defendants that their respective claims were not to be construed as general claims, but that they claimed they were entitled to the relief demanded in the amended bill of complaint herein.

#### V.

Replying to paragraph seven and eight of said further and separate answer, complainants deny that said warrants were received as collateral security for a loan, as alleged in said paragraph eight, and in that behalf allege that said warrants were purchased by said United States National Bank of Portland from the Kelso State Bank, and at the same time an agreement was entered into between said banks wherein and whereby said Kelso State Bank agreed to repurchase said warrants from said United States National Bank of Portland. As to the remaining allegations in said paragraphs seven and eight, complainants allege that they have no knowledge or information sufficient to form a belief, and therefore deny the same.

# VI.

Replying to paragraph nine of said further and separate answer, complainants deny each and every allegation therein contained, and in that behalf allege that the warrants, referred to in said paragraph nine, were purchased by the Kelso State 56

Bank from the United States National Bank of Portland in the manner and with the funds as alleged in complainants' amended bill of complaint herein, and not otherwise. Complainants further allege that, at the time of purchasing said warrants from the United States National Bank of Portland, the Kelso State Bank deposited said warrants with said United States National Bank of Portland to secure the deposits made by the county treasurer of Cowlitz County, in said Kelso State Bank, as alleged in the amended bill of complaint herein. [48]

WHEREFORE, complainants pray judgment in accordance with their amended bill of complaint herein.

LOREN GRINSTEAD,
GRINSTEAD & LAUBE,
WALLACE McCAMANT,
Solicitors for Complainants. [49]

State of Washington, County of King,—ss.

Personally appeared before the undersigned authority, a notary public in and for the State of Washington, Loren Grinstead, as attorney in fact for the Fidelity & Deposit Company of Maryland, a corporation, one of the complainants named in the foregoing reply, who, being duly sworn says: that he has read the foregoing Reply, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and, as to those matters, he believes it to be true.

LOREN GRINSTEAD.

Subscribed and sworn to before me this 15th day of December, A. D. 1921.

[Seal]

JO ROWE,

Notary Public in and for the State of Washington, Residing at Seattle Therein. [50]

Exhibit "A."

PROOF OF CLAIM

LIQUIDATING

KELSO STATE BANK, Kelso, Wash.

State of Washington, County of Pierce,—ss.

Personally appeared before me, the undersigned, a Notary Public in and for said county and state. H. T. Hansen, who being duly sworn, says that the FIDELITY & DEPOSIT COMPANY OF MARY-LAND is a corporation organized and existing under the laws of the State of Maryland, having its principal place of business at Baltimore, Marvland, and general agency office in the city of Tacoma, Washington; that he is the general agent and attorney in fact of said corporation and makes this proof of claim for and in its behalf; that he is authorized so to do and that the seal affixed hereto is the corporate seal of said corporation; that the Kelso State Bank, of Kelso, Washington, is fully indebted to said corporation in the sum of \$9213.20 upon the following claim, to wit:

The same being a portion of the balance due by said Kelso State Bank, of Kelso, Washington, to the Treasurer of Cowlitz County, Washington, which

portion of said account was on April 25th, 1921, duly and legally assigned to the said Fidelity & Deposit Company of Maryland by Linus Perry Brown as County Treasurer of the said Cowlitz County, which said assignment is hereto attached and made a part hereof.

All of which indebtedness is due and payable to said Fidelity & Deposit Company of Maryland, alone, it having given no endorsement or assignment of the same or any part thereof, and affiant further says that he knows of no offset or other legitimate or equitable defense to said claim, or any part thereof.

[Seal of Fidelity & Deposit Company of Maryland] H. T. HANSEN,

General Agent and Attorney in Fact for Fidelity & Deposit Company of Maryland.

Address: 214 Tacoma Bldg., Tacoma Wash. Subscribed and sworn to before me this 25th day of April, A. D. 1921.

[Notary Seal of Geo. B. Guyles.]

GEO. B. GUYLES,

Notary Public in and for the State of Washington, Residing at Tacoma.

Original of above proof of claim filed and approved this 25th day of April, A. D. 1921.

CLAUDE P. HAY,

Deputy Supervisor of Banking Liquidating Kelso State Bank. [51]

# EXHIBIT "A"—Page 2. PROOF OF CLAIM LIQUIDATING KELSO STATE BANK, Kelso, Washington.

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State of Washington, County of Pierce,—ss.

Personally appeared before me, the undersigned, a Notary Public in and for said county and state. H. T. Hansen, who being duly sworn, says that the FIDELITY & DEPOSIT COMPANY OF MARY-LAND is a corporation organized and existing under the laws of the State of Maryland, having its principal place of business at Baltimore, Maryland, and general agency office in the City of Tacoma, Washington; that he is the general agent and attorney in fact of said corporation and makes this proof of claim for and in its behalf; that he is authorized so to do and that the seal affixed hereto is the corporate seal of said corporation; that the Kelso State Bank, of Kelso, Washington, is fully indebted to said corporation in the sum of \$36852.86 upon the following claim, to wit:

The same being a portion of the balance due by said Kelso State Bank, of Kelso, Washington, to the Treasurer of Cowlitz County, Washington, which portion of said account was on April 25th, 1921, duly and legally assigned to the said Fidelity & Deposit Company of Maryland by Linus Perry Brown as County Treasurer of the said Cowlitz County, which said assignment is hereto attached and made a part hereof.

All of which indebtedness is due and payable to said Fidelity & Deposit Company of Maryland, alone, it having given no endorsement or assignment of the same or any part thereof, and affiant further says that he knows of no offset or other legitimate or equitable defense to said claim, or any part thereof.

[Corporate Seal Fidelity & Deposit Company of Maryland.]

H. T. HANSEN,

General Agent and Attorney in Fact for Fidelity & Deposit Company of Maryland.

Address: 214 Tacoma Bldg., Tacoma, Wash.

Subscribed and sworn to before me this 25th day of April, A. D. 1921.

[Notarial Seal, Warner Bruce.]

WARNER M. BRUCE,

Notary Public in and for the State of Washington, Residing at Tacoma.

Original of above proof of claim filed and approved this 25th day of April, A. D. 1921.

CLAUDE P. HAY,

Deputy Supervisor of Banking, Liquidating Kelso State Bank. [52]

# Exhibit "B,"

PROOF OF CLAIM
LIQUIDATING
KELSO STATE BANK,
Kelso, Wash.

State of Washington, County of Pierce,—ss.

Personally appeared before me, the undersigned, a Notary Public in and for said county and state, H. T. Hansen, who being duly sworn, says that the MARYLAND CASUALTY COMPANY is a corporation organized and existing under the laws of the State of Maryland having its principal place of business at Baltimore, Maryland, and general agency office in the City of Tacoma, Washington; that he is the general agent and attorney in fact of said corporation and makes this proof of claim for and in its behalf; that he is authorized so to do and that the seal affixed hereto is the corporate seal of said corporation; that the Kelso State Bank, of Kelso, Washington, is fully indebted to said corporation in the sum of \$18426.43, upon the following claim, to wit:

The same being a portion of the balance due by said Kelso State Bank, of Kelso, Washington, to the Treasurer of Cowlitz County, Washington, which portion of said account was on April 25th, 1921, duly and legally assigned to the said Maryland Casualty Company by Linus Perry Brown as County Treasurer of the said Cowlitz County, which said assignment is hereto attached and made a part hereof.

All of which indebtedness is due and payable to said Maryland Casualty Company, alone, it having given no endorsement or assignment of the same or any part thereof, and affiant further says that he knows of no offset or other legitimate or equitable defense to said claim, or any part thereof. [Seal of Maryland Casualty Company.]

H. T. HANSEN,

General Agent and Attorney in Fact for Maryland Casualty Company.

Address: 214 Tacoma Bldg., Tacoma, Wash.

Subscribed and sworn to before me this 25th day of April, 1921.

[Notary Seal] GEO. B. GUYLES,

Notary Public in and for the State of Washington, Residing at Tacoma.

Original of above proof of claim filed and approved this 25th day of April, A. D. 1921.

CLAUDE P. HAY,

Deputy Supervisor of Banking Liquidating Kelso State Bank.

Filed December 28, 1921. G. H. Marsh, Clerk. [53]

AND AFTERWARDS, to wit, on Thursday, the 30th day of March, 1922, the same being the 22d judicial day of the regular March term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [54]

In the District Court of the United States for the District of Oregon.

No. E-8573.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation, Complainants,

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a Corporation, and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

# Order Authorizing United States National Bank to Hold Warrants.

NOW AT THIS TIME, this cause coming on regularly for trial, the parties appearing by their respective attorneys of record, and the defendant Kelso State Bank and defendant John P. Duke, as Supervisor, also appearing by Mr. T. H. Adams, Special Deputy for the Liquidation of the Kelso State Bank, and the defendant The United States National Bank of Portland (Oregon), having produced in court and having offered to deliver into the registry of this court the warrants described in Exhibit "A" attached to and made a part of

its original answer and counterclaim, and by reference made a part of its amended answer and counterclaim, the principal sums thereof aggregating in amount thirty-one thousand nine hundred ninety-one and 59/100 dollars (\$31,991.59), as well as its cashier's check #129167 for the sum of five hundred forty-seven and 67/100 dollars, (\$547.67), and its cashier's check #132240 for the sum of ten hundred ninety and 05/100 dollars, (\$1090.05), the sums evidenced by such cashier's checks being the proceeds of the collection by the said bank of three diking district warrants of five hundred dollars (\$500.00) each and interest thereon to the date of such collection, of one hundred thirty-seven and 72/100 dollars (\$137.72). [55]

And it having been stipulated in open court between the plaintiffs and the said defendant, The United States National Bank of Portland (Oregon), and it having been conceded by the other defendants, through their failure to deny the allegations of the counterclaim set forth in the amended answer of The United States National Bank of Portland (Oregon) that such bank was and is, as to such warrants and as to the sums evidenced by such cashier's checks, a mere stakeholder between the parties and entitled to be discharged from further liability therein, except as hereinbefore set forth and to be paid from such fund its costs herein and its reasonable attorney's fees herein, and in this regard the Court finds that five hundred dollars (\$500.00) is a reasonable sum to allow the said defendant as its attorney's fees herein, and that the

said costs and the said attorney's fees be now deducted by the said Bank from the said funds in its possession and that as between the other parties hereto the said costs and attorney's fees be considered and treated as costs and taxed by the Court in its final decree, as to it shall then seem just and equitable.

And it having been further stipulated and agreed by and between all of the parties herein that said warrants and said cashier's checks and the proceeds of all thereof, less the sum of \$2.35, its costs herein, and the sum of \$500.00 attorney's fees, should be held by The United States National Bank of Portland, (Oregon), as bailee, subject to the further orders and the final decree of this Court herein, and that in the meantime The United States National Bank of Portland (Oregon), may, upon call of the officer charged with the liquidation of any of such warrants, forward the same for collection in the usual and customary manner and hold the proceeds thereof, less the usual customary and reasonable [56] collection charge, in lieu of such original warrants so called and collected.

NOW, THEREFORE, IT IS ORDERED AND DECREED as follows:

National Bank of Portland (Oregon) be now paid, out of and from the moneys and securities held by it as hereinbefore recited, the sum of five hundred dollars (\$500.00) on account of its attorney's fees and the further sum of \$2.35, its costs and disbursements herein and such sums as between the

other parties hereto to be considered as costs and to be taxed by the Court in its final decree as to it shall then seem just and equitable.

SECOND: That pending and subject to the further orders of this Court and the final decree of this Court upon the issues made or hereafter to be made between the plaintiffs herein and the defendants herein, other than The United States National Bank of Portland (Oregon), the said defendant, The United States National Bank of Portland (Oregon) hold the warrants described in Exhibit "A" attached to and made a part of its original answer and counterclaim herein and by reference made a part of its amended answer and counterclaim herein and the sums represented by its abovementioned cashier's checks, less its said costs and attorney's fees, as provided for in the preceding paragraph hereof as a bailee for all of the other parties herein as their interests therein may appear upon the said final decree of this Court and to be delivered as in said final decree provided, and that in the meantime said The United States National Bank of Portland (Oregon) be, and it hereby is, authorized, upon call of the officer charged with the payment of any of such warrants, forward the same for collection in the usual and customary manner and hold the proceeds thereof, less the usual customary and reasonable collection charge instead and in lieu of such warrants and upon the same terms and conditions and subject to the same orders and decree as hereinbefore provided [57] for such original warrants.

THIRD: And that said defendant The United States National Bank of Portland (Oregon) be, and it hereby is, discharged from all liability of any kind and nature to each, any, or all of the other parties hereto, except as provided for in the preceding paragraphs hereof, in connection with the said warrants and the proceeds thereof.

Dated at Portland, Oregon, this 30th day of March, 1922.

R. S. BEAN, Judge.

Filed March 30, 1922. G. H. Marsh, Clerk. [58]

AND AFTERWARDS, to wit, on the 8th day of May, 1922, there was duly filed in said court an Opinion in words and figures as follows, to wit: [59]

In the District Court of the United States for the District of Oregon.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CAS-UALTY COMPANY, a Corporation,

Plaintiffs,

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a Corporation, and THE KELSO STATE BANK, an Insolvent

Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of Liquidating the Assets of The Kelso State Bank,

Defendants.

## Opinion.

Portland, Oregon, Monday, May 8, 1922.

## MEMORANDUM BY BEAN, D. J.:

The Kelso State Bank was closed by order of the Banking Department of the State of Washington on March 17, 1921. At that time the County Treasurer of Cowlitz County had a credit balance in the bank of \$64,460.96 for public funds which had been deposited by him in a general checking account at various times from January 25th to March 14, 1921, inclusive, and upon which the bank was paying interest on the daily balances. The deposits were covered by surety bonds executed by the plaintiff companies and after the closing of the bank they paid the amount to the county, taking assignments of its claim against the bank.

Among the items deposited by the County Treasurer on March 14th was a check of the Puget Mill Company on Pope & Talbot, of San Francisco, for \$32,897.98, and which was used by the Kelso State Bank on the same date in payment of an indebtedness due from it to The United States National Bank of Portland, thereby releasing certain county warrants held by the [60] latter bank. Possession of the warrants was, however, retained by the United States National Bank at the request of the

Kelso State Bank as security for such further deposits of county funds as might thereafter be made with it.

The plaintiffs, claiming to be subrogated to the rights of the County, bring this suit to recover such warrants on the ground that the Kelso State Bank was hopelessly insolvent and known to be such at the time of the deposit of the Pope & Talbot check, and that such check was used in the purchase or redemption of the warrants now in controversy.

The United States National Bank, disclaiming any interest in the warrants, has been eliminated from the case and the controversy is between the plaintiffs and the liquidator of the Kelso Bank, who claims the warrants as part of the general assets of the bank for distribution among its creditors.

The deposits made by the County Treasurer were general and not special (Kies vs. Wilkinson, 99 Fed. 900). Unless, therefore, the Pope & Talbot check was received by the bank under such circumstances as would make it a trustee thereof ex maleficio, the Treasurer and his successor in interest are only entitled to share with the other creditors in the distribution of the assets of the bank. When a bank, being hopelessly insolvent, receives a deposit with the knowledge that it cannot longer continue in business, but must close its door, it is such a fraud upon the depositor that he may rescind the contract of deposit and recover the amount so deposited, or the proceeds, if traced into the assets of the bank coming into the hands of the receiver or liquidator

(Wasson vs. Hawkins, 59 Fed. 233; Richardson vs. New Orleans Debenture Redemption Co., Ltd., 102 Fed. 782; Brennan vs. Tillinghast, 201 Fed. 609). The mere fact, however, of insolvency at the time the deposit is received is not sufficient to confer the right of rescission. It will not arise, although the bank at the time of receiving the deposit was embarrassed and insolvent, if its officers had reason to believe that by continuing in business it might retrieve its fortune. The condition upon which the right of rescission is predicated is that the deposit was made when the bank was hopelessly insolvent and so circumstances as to constitute the receipt of the deposit a fraud upon the depositor (Brennan vs. Tillinghast, 201 Fed. 604; St. Louis & San Francisco Ry. Co. vs. Johnston, 133 U. S. 566.)

If the Kelso Bank was hopelessly insolvent at the time the deposit was made, and that fact was known to its officers, a fraud was undoubtedly committed upon the depositor for which there should be a remedy, if the deposit can be identified either in its original or altered form. These are questions of fact and the burden of proof is upon the complainants.

It is undoubtedly true, as was shown by the evidence, that the Kelso Bank was in fact insolvent at the time it received the deposit in question, in the sense that it did not possess sufficient solvent and marketable assets to meet its obligations; but it was a going concern and continued to receive deposits, pay checks and do a general banking busi-

ness for three days thereafter, until forced to close by order of the Banking Department. Its condition at the time the deposit was made differed in no substantial way from what it had been for a long time prior thereto, and so far as I can ascertain from the evidence the officers of the bank did not know or believe at that time that the bank was hopelessly and irretrievably [62] insolvent, but thought it would be able to continue in business.

The mere fact that it was financially embarrassed is not sufficient of itself to establish the fraud alleged. As was said by Judge Gray in Quin vs. Earle, 95 Fed. 732:

"A trader, whether a corporation or an individual, may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent. Property received by such an individual or concern during the period of such embarrassment becomes honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions."

Banks in many instances no doubt continue to do their regular and ordinary business for long periods, though in a condition of actual insolvency, and it cannot surely be said that such a bank is to be regarded as a trustee *ex maleficio* for all deposits received in the due course of its business when there is no intention of closing its doors. There is often hope, if only the credit of the bank can be

kept up by continuing its ordinary business and by avoiding any act of insolvency, that affairs may take a favorable turn and thus suspension be avoided.

The evidence in this case fails to show any intent or expectation on the part of the officers to close the bank at the time the deposit was received. but rather that it would be able to continue business. in the usual manner. It is undoubtedly true that Stewart, the cashier, knew of its embarrassed condition and that it had a large amount of [63] outstanding paper which it had carried for a long time, some of which was uncollectible, and a portion of which was of doubtful value, but the evidence does not show that he knew or believed that it was hopelessly insolvent at the time; on the contrary, the evidence indicates that he honestly believed, perhaps mistakenly, that the bank would be able to maintain its credit, surmount its difficulties, and continue in business.

It is claimed by the plaintiffs that the Pope & Talbot check was used by the Kelso Bank to purchase the warrants in controversy, and that such warrants were left with the United States National Bank as security for deposits of county funds in the Kelso Bank. The evidence is clear that the purpose of the Kelso Bank in leaving the warrants with the United States Bank was not to secure deposits of county funds already made, but in the hope that it would be able to obtain future deposits of such funds. It is equally clear that the warrants were not in fact purchased by the Kelso Bank

from the United States Bank. They did not belong to the latter bank. They were the property of the Kelso Bank and in September and December, 1920, were deposited by it with the United States Bank as collateral security for loans made by it to the latter. The transactions were regarded as loans by both banks, they were renewed from time to time and interest charged and paid thereon. They were carried as loans on the books of the lending bank and were so reported by it. The so-called repurchase agreement executed by the Kelso Bank at the time the warrants were delivered to the United States Bank were merely a convenient method cf evidencing the transaction, and did not change or alter the actual understanding and intention of the parties. When, therefore, the Kelso [64] Bank paid the loan it simply repossessed itself of that which belonged to it, but which had been pledged to secure the loan.

It follows that the bill should be dismissed and it is so ordered.

Filed May 8, 1922. G. H. Marsh, Clerk. [65]

AND AFTERWARDS, to wit, on Monday, the 8th day of May, 1922, the same being the 55th judicial day of the regular March term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [66]

In the District Court of the United States for the District of Oregon.

No. E-8573.

May 8, 1922.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and THE KELSO STATE BANK, an Insolvent Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington.

#### Final Decree.

This cause was heard by the Court upon the pleadings and the proofs, plaintiff appearing by Mr. Wallace McCamant, Mr. Thomas E. Davis and Mr. Loren Grinstead, of counsel, and defendant United States National Bank of Portland by Mr. Palmer Fales, of counsel, and defendants The Kelso State Bank and John P. Duke by Mr. A. L. Miller, of counsel. And the Court having heard the evidence adduced, and the arguments of counsel, upon consideration thereof—

IT IS ORDERED that the bill of complaint herein be and the same is hereby dismissed, and that defendants do have and recover of and from said plaintiffs their costs and disbursements here-

in, taxed at \$\_\_\_\_\_, and that said defendants have execution therefor.

R. S. BEAN, Judge.

Filed May 8, 1922. G. H. Marsh, Clerk. By E. M. Morton, Deputy. [67]

AND AFTERWARDS, to wit, on the 22d day of July, 1922, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [68]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Complainants.

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the KELSO State Bank,

Defendants.

# Petition on Appeal and Order Allowing Same.

The above-named complainants, Fidelity and Deposit Company of Maryland, a corporation, and Maryland Casualty Company, a corporation, feeling aggrieved by the decree rendered and entered in the above-entitled action on the 8th day of May. 1922, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, under the rules of such Court in such cases made and provided.

AND your petitioners further pray that the proper order relating to the security required of them to perfect this appeal be made.

Dated this 21st day of July, 1922.

McCAMANT & THOMPSON and GRINSTEAD & LAUBE,

Solicitors for Complainants and Appellants.

Dated this 21st day of July, 1922.

R. S. BEAN.

Filed July 22, 1922. G. H. Marsh, Clerk.  $[681/_{\!2}]$ 

AND AFTERWARDS, to wit, on the 22d day of July, 1922, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [69]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and THE KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

# Assignment of Errors.

Come now the complainants in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause,

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from the decree made by this Honorable Court on the 8th day of May, 1922.

I.

That the Court erred in dismissing the amended bill of complaint of these petitioners and appellants for want of equity at complainants' costs.

II.

That the Court erred in finding the issues in favor of the defendants, Kelso State Bank, an insolvent banking corporation, and John P. Duke as Supervisor of Banking of the State of Washington in charge of and liquidating the assets of the Kelso State Bank.

III.

That the decree is against the manifest weight of evidence.

IV.

That the decree is contrary to law. [70]

V.

That the Court erred in failing to find the issues in favor of complainants on the first cause of action set out in the amended bill of complaint herein.

VI.

That the Court erred in decreeing that the warrants referred to and described in the amended bill of complaint be delivered to the defendant, John P. Duke, as Supervisor of Banking of the State of Washington.

VII.

That the Court erred in failing to find that the complainants were entitled to the possession of

the warrants described in the amended bill of complaint.

#### VIII.

That the Court erred in failing to find in favor of the complainants on the second cause of action stated in the amended bill of complaint herein.

#### TX.

That the Court erred in failing to find in favor of the complainants on the third cause of action stated in the amended bill of complaint herein.

#### X.

That the Court erred in holding that complainants were not entitled to a preferred claim against the defendants, Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington in charge of and liquidating said bank.

#### XI.

That the Court erred in holding that the warrants described in said complaint were not deposited with the United States National Bank of Portland, Oregon, as security for County [71] funds deposited in the Kelso State Bank by the County Treasurer of Cowlitz County, Washington.

#### XII.

That the Court erred in failing to find that the warrants described in the amended bill of complaint were deposited with the United States National Bank of Portland, Oregon, as security for deposits of public moneys which the County Treasurer of Cowlitz County, Washington, had on deposit in the Kelso State Bank on the 14th day of March, 1921.

#### XIII.

That the Court erred in holding that the officers of the Kelso State Bank did not believe that said bank was hopelessly insolvent on and prior to the 14th day of March, 1921, and at the time when the deposits of public moneys belonging to Cowlitz County, Washington, were made in said bank by the County Treasurer of Cowlitz County, Washington.

#### XIV.

That the Court erred in failing to find the warrants described in the amended bill of complaint were purchased or repurchased from the United States National Bank of Portland, Oregon, by the Kelso State Bank with moneys belonging to Cowlitz County, Washington, which moneys were trust funds in the hands of said Kelso State Bank.

WHEREFORE appellants pray that said decree be reversed and that the District Court of the United States for the District of Oregon be instructed to enter such decree as is proper on the record.

# McCAMANT & THOMPSON and GRINSTEAD & LAUBE,

Solicitors for Appellants.

Filed July 22, 1922. G. H. Marsh, Clerk. [72]

AND AFTERWARDS, to wit, on the 22d day of July, 1922, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [73]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

# Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that the Fidelity and Deposit Company of Maryland, a corporation, and the Maryland Casualty Company, a corporation, as principals, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, authorized and existing under the laws of the State of New York, authorized to become surety on bonds and undertakings required by the laws of the United States, as surety, are held and firmly bound unto the Kelso State Bank, an insolvent banking corporation, and John P. Duke,

as Supervisor of Banking of the State of Washington, in charge of and liquidating the assets of the Kelso State Bank, in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States, to be paid to them or their respective successors, for which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns by these presents.

WHEREAS the above-named Fidelity and Deposit Company of Maryland, a corporation, and Maryland Casualty Company, a corporation, have prosecuted an appeal to the United States [74] Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the District Court of the United States for the District of Oregon in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Fidelity and Deposit Company of Maryland and Maryland Casualty Company shall prosecute their said appeal to effect, and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREFORE, we have caused this instrument to be signed in our combined names, by our respective agents and attorneys this 22d day of July, A. D. 1922.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By GRINSTEAD & LAUBE, Its Attorneys.

# MARYLAND CASUALTY COMPANY, By GRINSTEAD & LAUBE,

Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK,

By W. A. KING, (Seal)
Resident Vice-President.
Attest: G. M. SMITH,
Resident Asst.-Secretary.

The within bond is approved, both as to sufficiency and form, this 22d day of July, A. D. 1922.

R. S. BEAN,

Judge.

Filed July 22, 1922. G. H. Marsh, Clerk. [75]

AND AFTERWARDS, to wit, on the 24th day of July, 1922, there was duly filed in said court, a Praecipe for Transcript, in words and figures as follows, to wit: [76]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and the

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KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

# Praecipe for Transcript of Record.

In the preparation of the record on appeal in the above-entitled action, please incorporate into the transcript the following papers and documents only:

- 1. Amended bill of complaint.
- 2. Answer of the defendants Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington, to the amended bill of complaint.
- 3. Reply of complainants to the answer of defendants, Kelso State Bank and John P. Duke, as Supervisor of Banking of the State of Washington.
- 4. The order made and entered by the aboveentitled court on the 30th day of March, 1922, relative to the United States National Bank of Portland retaining said warrants and money in its possession until the further order of the Court.
- 5. The statement of evidence when settled (including plaintiff's exhibits numbered 1 to 32, inclusive, and Defendants' Exhibits "A," "B," "C" and "D"). [77]
- 6. The opinion or decision of the Court dated May 8, 1922.
  - 7. The decree of the above court.

- 8. The petition on appeal, order allowing appeal and fixing amount of bond, and bond on appeal.
  - 9. Citation on apeal.

Dated this 22d day of July, 1922.

McCAMANT & THOMPSON and GRINSTEAD & LAUBE,

Attorneys for Appellants.

Service of the foregoing praecipe and receipt of copy acknowledged this 22d day of July, 1922.

A. L. MILLER, Attorney for Appellees.

Filed July 24, 1922. G. H. Marsh, Clerk. [78]

AND AFTERWARDS, to wit, on the 17th day of August, 1922, there was duly filed in said court a statement of the evidence, which with the exhibits specified in the order of court filed August 22, 1922, is in words and figures as follows, to wit: [79]

In the District Court of the United States for the District of Oregon.

E-8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and

the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington in Charge of and Liquidating the Assets of the Kelso State Bank,

Defendants.

#### Statement of Evidence.

Comes now the complainants and the appellants in the above-entitled action, and present this, their statement of the case, and ask to have the same duly allowed, settled and signed as and for the statement of the proceedings in said cause at the trial, and as containing all the evidence material to the hearing of the appeal in said cause, except the original exhibits introduced in evidence at the trial of said cause, being Plaintiffs' Exhibits 1 to 32, inclusive, and Defendants' Exhibits "A" to "D," inclusive.

And as to said exhibits, said appellants respectfully request this Court to order the original exhibits on file herein to be certified by the clerk of this Court and to be by him sent to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as part of the record in this case.

McCAMANT & THOMPSON and GRINSTEAD & LAUBE,
Solicitors for Appellants. [80]

In the District Court of the United States for the District of Oregon.

E-8573.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation, Plaintiffs,

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND, (OREGON), a Corporation, and THE KELSO STATE BANK, an Insolvent Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of Liquidating the Assets of the Kelso State Bank,

Defendants.

#### STATEMENT OF EVIDENCE.

The above-entitled cause came on for trial before Honorable Robert A. Bean, Judge of the United States District Court, for the District of Oregon, at Portland, Oregon, on March 29th, 1922, at ten o'clock A. M. of said day.

The plaintiffs appeared by Mr. Wallace McCamant, Mr. Loren Grinstead, and Mr. T. E. Davis, their attorneys.

The defendant, The United States National Bank of Portland, by Mr. Palmer L. Fales, its attorney, and Mr. A. L. Miller, attorney for the remaining defendants. [81]

By order of the Court, subject to the stipulation of counsel, the warrants in question, involved in this controversy, and the proceeds thereof, were ordered to be held by the defendant, The United States National Bank of Portland (Oregon), pending the final determination of this litigation between all parties. (Test'y 2.)

Testimony was introduced on behalf of plaintiffs as follows:

# Testimony of T. H. Adams, for Plaintiffs.

T. H. ADAMS, being first duly sworn, testified:

On direct examination, in answer to interrogatories propounded by Mr. McCAMANT, the witness testified:

I am special deputy supervisor of Banking in the State of Washington in charge of the liquidation of the Kelso State Bank, being a deputy under Mr. Duke, one of the defendants.

I took charge of the Kelso State Bank on April 27th, 1921. (Test'y 3.)

That was a little over a month after it closed. I am the custodian of the books and papers of the Kelso State Bank. As to having a list of the assets and liabilities of the Bank as of date February 21, 1921, I have the commissioner of Bankings report to the Court on that day. The law providing for a Supervisor of Banking went into effect shortly after the closing of the Kelso State Bank, and the officers so designated formerly was Commissioner of Banking. This was Mr. Claude B. Hay, and he had closed the bank and had made a report to the

Superior Court as required by law dated March 17th. I have a copy of that report. (Test'y 4.)

The report referred to, prepared by Mr. Hay, was produced [82] by the witness, who testified that such report bore the signature of Mr. Hay.

The report was then offered in evidence and marked Plaintiffs' Exhibit 1. (Test'y 6.)

The witness further testified:

I am familiar with the signature of Mr. Corothers, the President of The Kelso State Bank, and the signature appearing on the photographic copy of the report of the condition of The Kelso State Bank of date February 21, 1921, is in my opinion the genuine signature of Mr. Corothers. I have no occasion to doubt that that report is a photographic copy of the original genuine report. Mr. Corothers was the president of the institution for a considerable time before it closed.

Photographic copy of report was then offered in evidence and marked Plaintiffs' Exhibit 2. (Testimony 7.)

The attention of the witness was called particularly to the following language contained in the report: "Warrants and bonds sold with agreement to repurchase \$86,537.14," and the witness was asked to state to the Court how the bank carried such transactions as to turning warrants over to another bank under an agreement to repurchase them.

The witness testified in response to the question: On that day, the bank's general ledger showed

debit warrants \$728.43, credit warrants \$103.95, Balance \$91,765.05 on the upper half of the ledger among the assets. Among the liabilities it is recited on that date: Debit warrants \$103.95, balance \$86,-537.14. It is warrants sold with the repurchase agreement. That is to say, that on that date, there were warrants in the possession of other banking institutions aggregating \$86,000.00 and some odd thousand dollars which the [83] Kelso State Bank was obligated to buy back, which was just carried in the same form as its rediscounts. (Testimony 8.)

I have at least some of the repurchase agreement given by the Kelso State Bank to the United States National Bank covering the particular warrants concerned in this case. I now produce the original dated December 6, 1920, and December 8, 1920. The renewals I do not know that I have, Referring to the instrument of date December 6, 1920, purporting to be signed Kelso State Bank by George T. Plamonden, Assistant Cashier, in my opinion, the signature appearing thereon is genuine; I am familiar with Mr. Plamonden's signature. (Testimony 9.)

The paper identified by the witness was then offered in evidence and marked Plaintiffs' Exhibit 3. (Testimony 9.)

The witness produced the agreement of date December 8, 1920, and the Court asked the witness to explain the pencil memorandum appearing in the

(Testimony of T. H. Adams.) margin of Plaintiffs' Exhibit 4 to which the witness replied:

I had noticed that. While I have not checked it up, I assume that to be some warrants that were called by the County Treasurer and which were deducted and sent to the County Treasurer. (Testimony 10.)

In my opinion, those were taken out of the warrants with the United States Bank. I do not know who made that memorandum. I suppose it was the United States National Bank. If it is important, I could tell. (Testimony 11.)

I have not been able to find the renewals; but it is my [84] understanding that the renewals were instruments of the same purport. I find reference to the renewals in the correspondence; and it is my idea that the renewals are with that document that you requested me to produce which I could not, the receipt, or whatever you may be pleased to term it, that the United States National Bank issued on behalf of the County Treasurer. It is my idea that they are all together. I do not think I have ever seen the renewal agreements. (Testimony 11.)

Witness having produced certain slips which are in the files, attached to the instruments Plaintiffs' Exhibits 3 and 4, those slips were then offered in evidence and marked Plaintiffs' Exhibit 5. (Testimony 12.)

Answering the question propounded by the Court about the memorandum in part, that the total amount the Kelso State Bank received credit for

in the amount in pencil, either when they check them up the Kelso State Bank or the United States National Bank made that correction. (Testimony 12.)

Further testifying, the witness produced a statement of the account of Linus Perry Brown, County Treasurer, with Kelso State Bank, for the entire term of office of said County Treasurer. That is the original ledger sheets showing the statement as it appears on the books of the bank. I have a copy prepared in my office under my direction which covers the whole account. (Testimony 13.)

Statement of account of County Treasurer with Kelso State Bank from January 27th, 1921, to March 17, 1921, was then offered in evidence and marked Plaintiffs' Exhibit 6. (Testimony 13.)

Further testifying witness said: I have not prepared a statement showing the amount of cash [85] on hand at the end of the day in the Kelso State Bank for every day beginning with the 27th of January, 1921, down to the time the bank closed. but the general ledger shows that for itself. This statement gives the cash on hand but included therein are any unpaid checks, which are usually termed cash items. They are combined in this ledger. They read as follows: January 27th, \$27,-726.02; January 28th, \$27,570.91; January 29th, \$27,538.28, with \$5.00 added in a brace additional; that is evidently the entry was made and then a discovery of an error of \$5.00, which was run in with a brace. January 31, \$28,414.66; on February 1, \$25,272.45; February 2, \$24,709.68; February 3,

\$24.391.10: February 4, \$24,101.67; February 5, \$22,661.36; February 7, \$23,092.84; February 8, \$23,-769.20; February 9, \$23,153.97; February 10, \$22,-777.45; with \$1.45 run in with a brace as before; February 11, \$23,104.97, with \$5.00 in a brace again; February 14, \$24,156.20; February 15, \$24,775.79; February 16, \$23,984.00; February 17, \$23,273.07; February 18, \$20,971.46; February 19, \$21,761.10; February 21, \$21,067.81; February 23, \$21,821.19; February 24th, \$19,459.13; February 25, \$20,612.40; February 26th, \$19,062.53; February 28, \$18,417.22; March 1, \$18,062.47; March 2, \$17,792.97; March 3, \$18,553.68; March 4, \$17,983.61; March 5, \$16,031.75 with \$25.00 in a brace additional; March 7, \$16,-735.45; March 8, \$22,710.30; March 9, \$22,162.33; March 10, \$17,900.15; March 11, \$17,337.78; March 12, \$17,625.91; March 13—that is corrected in pencil, the 14th,—it was stamped in 13 and is corrected to the 14th,—March 14th, \$20,471.55; March 15, \$20,072.29; March 16, \$18,897.50. Without checking I could not tell whether that is 97 or 99; it is blurred. March 17th, \$17,189.32. (Testimony 14, 15.) [86]

Some of that \$17,000 dollars was made up of cash items, that last day's amount. Looking at the examiner's report for that day, which is exhibit 1, it appears from that report that the cash items amount to \$861.27. They were not all collected. There is one item still uncollected of \$174 of that, war saving stamps, turned in by Mr. Stewart as administrator or guardian, at any rate as an officer of an estate, which could not be collected, and

which we had to charge back and turn over to the administrator *de bonis non*, or to his successor; at any rate, and file our claim for an overdraft. Mr. Stewart, as I understand, turned these in to cover an overdraft which he had made as this officer; I cannot remember whether it was as administrator or guardian. (Testimony 16.)

We have filed a claim against the estate to offset this \$174.00; gave the state a credit balance; eliminating that it had a debit balance; and we filed our claim for the debit balance. I think the estate is solvent and that will eventually come in for whatever our claim for the debit balance is. There are perhaps some other small items that I am unable to answer for, but I do not think any considerable amount. Our claim is for \$60.00 and that would make a difference of about \$114.00 in this war savings account which will, in my opinion, eventually come in. (Testimony 16.)

Witness produced deposit slips showing the deposits made by the County Treasurer on March 10th, and March 14th, 1921; showing that the deposits of March 10th amounted to \$6,572.55; and on March 14th, \$35,337.57. (Testimony 17.)

List dated March 10th, 1921, offered in evidence and marked Plaintiffs' Exhibit 7. (Testimony 18.)

List dated March 14th, 1921, offered in evidence and marked [87] Plaintiffs' Exhibit 8. (Testimony 18.)

In response to inquiry, the witness produced Commissioner's copy of letter from Bank Commissioner

to F. L. Stewart of date December 15, 1919, signed L. H. Moore, Deputy Commissioner; and testifying in regard to correspondence passing between Commissioner and Kelso State Bank, the witness said:

Before we pass that, if I may answer, the letters from the Commissioner to Mr. Stewart are from the Division of Banking to Mr. Stewart and the copies of the Examiner's report left with the Kelso State Bank I have not been able to find. I have never seen them. I do not know where they are; but the most of these, if not of all of them, I have the copies which we brought from the office at Olympia, which will not be disputed. (Testimony 19.)

Witness produced copy of letter from Banking Department State of Washington to F. L. Stewart, Cashier Kelso State Bank, dated December 15, 1919, which was offered in evidence and marked Plaintiffs' Exhibit 9. (Testimony 20.)

Witness produced copy of Bank Examiner report of examination made of Kelso State Bank on November 18, 1920, by H. S. Bennett and Ralph R. Knapp, Bank Examiners of the State of Washington, and summary of report at the end thereof was offered in evidence and marked Plaintiffs' Exhibit 10. (Test'y 21.)

Witness produced copy of letter from Bank Commissioner to F. L. Stewart, Cashier Kelso State Bank, dated February 1, 1921, which was offered in evidence and marked Plaintiffs' Exhibit 12. (Testimony 22.)

Witness produced copy of letter from Bank Commissioner to F. M. Corothers, President Kelso State Bank, dated March 7, 1921, which was offered in evidence and marked Plaintiffs' Exhibit 12. (Testimony 22.) [88]

Witness produced copy of a second letter from Bank Commissioner to F. M. Corothers, President of Kelso State Bank of date March 7, 1921, which was offered in evidence and marked Plaintiffs' Exhibit 13. (Testimony 23.)

Plaintiffs' Exhibit 12 and 13 were read to the Court. (Testimony 23, 24, 25.)

Witness produced copy of letter from Bank Commissioner to Fred L. Stewart, Cashier Kelso State Bank, dated March 7, 1921, which was offered in evidence and marked Plaintiffs' Exhibit 14. (Testimony 25.)

Exhibit 14 was read to the Court. (Testimony 24.)

Counsel for Plaintiffs then offered in evidence the call for an assessment for one hundred per cent of the stock of the Kelso State Bank, made by Bank Commissioner under date March 7, 1921, which was offered in evidence and marked Plaintiffs' Exhibit 15. (Testimony 25.)

Counsel for plaintiffs produced letter written by witness of date October 13, 1921, which was identified by the witness, and was offered in evidence and marked Plaintiffs' Exhibit 16. (Testimony 25, 26.)

Testifying as to what dividends the Kelso State Bank has paid during the period of liquidation, the

witness said that a twenty per cent dividend had already been paid; and in response to the inquiry as to the judgment of witness as to what would be paid in the future, witness said: (Testimony 26.)

It very large depends on the outcome of this suit. There is not any other one item on which so much hinges as this suit. This, of course, is not the only suit. We have another suit against them on Mr. Stewart's bond involving \$20,000.00, which we may lose. We then have a suit in contemplation against the [89] Board of Directors, and in addition to that we are involved in quite a good deal of litigation over claims which have been disapproved, the outcome of which is problematical. Some of these cases have been tried and some of them we have won and some of them we have not had a decision in yet. If I might be permitted to sum it up about this way, that if the worst happened to us that could happen or that might happen in this matter, the litigations, and so on, that we might pay only ten or fifteen per cent more. If the best happened that could happen, we might pay thirty-five or forty per cent more. Eliminating the possibility of suit against the Board of Directors, I would say that forty per cent more is the maximum. (Testimony 27.)

In giving these figures, I have figured in returns from assessments levied on the stockholders; of which everything has been collected except Stewart's. In my opinion, Mr. Stewart's assessment cannot be collected. (Testimony 27, 28.)

The claims that were approved prior to the payment of dividends amount to \$348,387.37 general claims; in addition to that there will be about \$40,000.00 that already have or will be presented; of which \$1,054.00 preferred claims have been approved to date; making a total of about \$350,000.00 approximately of all claims that have been approved. (Testimony 28.)

Turning to the claims rejected. I find that at that time I rejected \$15,004.16 of preferred claims. Of these \$15,004.16, \$5,038.34 has been approved as a general claim, and \$1,101.50 has been approved through suit as a general claim; \$2,028.67 through litigations has been approved as a general claim; \$6,066.09 has been approved as to a little less than half of it as a general claim; those are preferred claims that were [90] rejected at the time, being thought to be a preference and they were rejected as a preference, but which, some voluntarily and some amicably, and some through litigation have been approved as general claims since that report was filed. \$750.00 has been rejected definitely. I have no statement as to the extra amount of claims that have been approved since the report was filed, because those come in from time to time and we hang them on a hook until we get enough to write them up. (Testimony 29.)

In the general claims rejected at that time, there is \$52,192.25, some of which has been wiped out. Some of these claims making up that amount are still being asserted by the claimant; and some of

them have been determined. For instance, one item \$11,930.00 a claim filed by the United States National Bank has been eliminated. Practically all of that \$52,000.00 is still being asserted by the claimant as valid except the item of \$11,930.00 of the United States National Bank. Here is one item of \$14,000.00 of S. A. George which is in the Courts at this time, and of John Roth \$100.00, which are a part of the \$52,000.00. To sum it up substantially, the aggregate of the claims that have been approved is something in excess of \$360,000.00; and there is about \$40,000.00 more claims that are asserted and still undetermined. (Testimony 30.)

During the year that the bank has been in liquidation, the cash collections I cannot give accurately because I have no documents that I think of here that would tell me. We have paid out in dividends twenty per cent of this \$360,000.00; and a little more than \$1,000.00 preferred; which would amount to approximately \$73,000.00 that has been paid in dividends, including the preferred. (Testimony 30, 31.) [91]

There is in cash on hand now something more than \$30,000.00. (Testimony 31.)

Testifying as to the condition of the assets of the estate at the present time, the witness said:

We have not collected substantially all that is collectable. The readily collectable part, of course, is already made; but we have some long time paper that is not yet due and some paper which is due which is being paid in in installments. We have

some warrants which have not yet been called; we have a few bonds which are getting a little better all of the time; and not selling them, and some mortgages that are good, I think, yet I have not been able to realize on them yet. But I would not want to hazard a guess as to the amount of collections which will be made on those assets, or how much more money will be collected by the estate on those assets apart from the result of the litigation with the directors. (Testimony 31.)

Of the one hundred per cent assessment upon the stockholders a little more than half of it has been collected. Mr. Stewart held between eleven and twelve thousand dollars in par value of the stock. The bank was capitalized at \$25,000.00; and we collected between twelve and thirteen thousand dollars from the stockholders. (Testimony 32.)

When the bank closed its doors, the total bills receivable amounted to, as shown by the examiner's reports in evidence, on March 17, \$320,566.64; and an item of \$2,000.00 was added by the Commissioner after the closing of the bank, and that amount is included in the revised and corrected total. (Testimony 32, 33.)

forty to [92] fifty per cent of them are uncollectable. I will qualify that by adding, that some of them we have classed as uncollectable have been compromised, fifty cents on the dollar, something like that, we find that all of the time; now and then possible to realize something out of what we thought

was valueless. It is useless in my judgment to sue a great many of the makers of those notes, and yet that opinion is subject to correction by finding something now and then that can be reached. (Testimony 33.)

Other than the bills receivable, the bank had in the way of assets some bonds and warrants, it had its bank house and furniture, which has been sold since for \$27,000.00. The bonds and warrants I spoke of eliminating those involved in this case amount to between twenty and twenty-five thousand dollars. In addition to the assets already enumerated, the bank had cash on hand amounting to some \$17,000.00; of which there were overdrafts amounting to \$4,438.15. Of those I have collected practically all except the overdraft of the Cashier, Mr. Stewart, which is uncollectable, in a claim of the Federal Reserve Bank which was rejected. The Stewart overdraft amounted to about \$3,300.00. The most of the overdraft had not been collected, unless the Federal Reserve Bank failed to file a claim on which, which I hold they are not entitled to a claim on it, and they have not sued me yet. If that is offset, or failed to develop as a claim against the bank, the draft would be practically all collected in that way. (Testimony 34.)

In giving the amount of loans and discounts by the bank, I neglected to include in that the real estate loans which I carried under a separate caption. As revised and corrected after closing the real estate loans are \$45,582.00. (Testimony 25.)

Of the real estate loans, the major portion of it is still [93] uncollected. In my judgment, as to how much of them will be collected, if you will allow me to reckon as I think of them, there is one item of \$800.00 that will not be collected; there is an item of about \$300.00 that will not be collected; there is an item of \$1,000.00 that is problematical; and there is an item of \$3,800.00 and a few dollars that is very doubtful. Something will be realized on it, but the mortgaged property is not worth the amount of the mortgage. The balance that has not been collected I believe will be collected as I think of it now. (Testimony 35.)

I cannot state anywhere near accurately what proportion of the total general bills receivable, \$322,000.00, approximately, has been collected in the year that the bank has been closed, during the period of liquidation. (Testimony 35.)

there is one \$6,000.00 item and two items of about \$5,000.00. I am speaking of the notes Mr. Stewart had in the bank. He was not indebted to the bank in the sum of over \$100,000.00 in one way or another. He had placed in the bank certain paper, and in way or another had taken credit for that, which I am unable to realize on, if I can realize on at all; but there are some \$55,000.00 that I have based a claim against the bonding company on as having been illegal. Unless I can recover from the bonding company in that suit, that \$55,000.00 is hopelessly lost. I have heard the administrator

of the Stewart estate say that Stewart is absolutely insolvent; and he told me it was useless to file a claim; and that is my judgment of it. (Testimony 36.)

Of the \$322,000.00 of bills receivable in the bank. there is at least \$100,000.00 that is absolutely hopeless. [94] I think that the total amount I have been able to collect on bills receivable has not exsceeded \$50,000.00 after a year's efforts. It would be difficult for me to describe the efforts I have put forth during the past year to collect those bills receivable; I have done everything that I thought twould bring results. I have not pressed some paper that I thought was good for a good, long while, not since the filing of this suit for the reason that I concluded I could not use the money if I had it, and if it were drawing interest, I was just as well off than if I had the money; that much bettter off, I mean. That is on paper that I consider good. I could not state how much that amounts tto; only I know that in time, where we could re-'new a note and get some security and get it in proper shape, that I have not worried about it, the time that it would run. I have handled probably twenty or twenty-five thousand dollars, and there is probably some more that does not just come into my mind at this time. (Testimony 37.) Of the claims that I regard as uncollectable, none that I think of right now, originated subsequent to January 27th, 1921. (Testimony 37.) The condition of the bank on March 17, 1921, in

my opinion was practically identical with its condition on January 27th, 1921, and for a long time prior to that. (Testimony 37, 38.)

A great many of these bills receivable that I have spoken of had been carried for a year or more by renewals at the time the bank closed; I think at least half of it; about that same half had been in the bank for two years prior to the time the bank closed; and in one form or another, I would say that from seventy-five to one hundred thousand dollars had been carried in the bank since 1915. (Testimony 38.) [95]

Some of that seventy-five to one hundred thousand dollars had received payments in real money; but a great many of them had not, but had been renewed with the interest added. (Testimony 38.)

Of that one hundred and sixty thousand or thereabouts that had been in for two years or more in the bank, upon which any payments had been made in real money, there was one item of about \$60,000.00 to one corporation and its officers and personally, one way and another employees that had some payments on it from time to time along in cash. While I have never tried to analyze that account, or had an opportunity to study it, and be able to say how much was paid in cash, I will say that a considerable amount of it was paid by other securities, perhaps some of which were a loss, and some of which have been and are still being realized on. That indebtedness was cut down to less than \$25,-

000.00 so far as to the corporation making it and its officers are concerned before the bank closed; but as to the direct outcome or outgrowth of that there were several other securities, at least some of them, which are still in the bank; they are doubtful as to what will be realized upon them. I believe there are none that I think of that I consider hopeless. (Testimony 39.)

Could pass on them if I had them before me, in the bank on which no payment in real money had been paid for two years prior to the closing of the bank, I would say that there were as much as \$75,-000.00. (Testimony 39.)

Referring to Bank Examiner's report of November 20, 1920, Plaintiffs' Exhibit 10 and to the list of bills receivable aggregating some \$114,000.00 set forth therein by the [96] Bank Examiner, a number of these were eliminated by the bank before it failed: the indebtedness of Fritz Kruse is one I have just come to; of Robert Bowman I have no knowledge and perhaps that; and M. E. Cue is largely eliminated, there is not so much indebtedness as that. I cannot quite remember but it seems that we have but little of that paper. I do not remember and cannot say positively that we do not have the Fritz Kruse note. We have the indebtedness of the Peters Garage, \$7,500.00 has been liquidated in full, compromised at about sixty to sixty-five cents on the dollar. But very little has been paid on the Secor Brothers, which is uncollectable. The Frank Sheppard item has been

liquidated or compromised. A considerable amount of Frank Sheppard paper had been sold to customers; and I believe we settled with Sheppard at twenty cents on the dollar; from twenty to thirtythree and one-third. Many of these settlements I cannot be absolutely sure of. We have realized on the claim of the Hub Printing Company, \$2,000.00 or a little more; the A. E. Johnson indebtedness is a part of the Cowlitz Bridge Company indebtedness; the entire indebtedness has been combined and on this they are paying five hundred dollars a month and one payment and a part of another payment has been applied on the A. E. Johnson note, about \$660.00. The J. H. Gallagher note is another of the Cowlitz Bridge Company, which is combined and on which is being paid \$500.00 a month. The Lulu B. Wells note has had some payments through sale of mortgaged property and only two or three hundred dollars. The indebtedness of Corvallis Sand and Gravel Company is another item of the Cowlitz Bridge Company business, which I mentioned; my [97] agreement with the managers contemplated the payment of one item of \$2,000.00 first, which has been paid, then the note of \$4,000.00 to be second; on that there is a payment and a part, about \$660.00. When that note is paid out, the note of J. H. Gallagher and Corvallis Sand and Gravel Company will alternate and receive the five hundred dollars alternate months as credits. Those are about the

amounts that we have realized on this \$114,000.00 of bills receivable. (Testimony 40, 41, 42.)

During the year that I have been in control of the assets of the Kelso State Bank, Mr. A. L. Miller has been my attorney and I have advised with him from time to time. He has never had anything to do with salvage at all, I believe. Other attorneys have been making these collections. (Testimony 42.)

In my answer, I have alleged and believe it to be true, that F. L. Stewart, Cashier of Kelso State Bank, was guilty of criminal misconduct of the affairs of the bank. I do not believe I would want to undertake to say how much of the amount of money that was unlawfully abstrated by Mr. Stewart from the assets of the bank would be criminal and how much would not be. I do not think I would be competent to pass on that, but some \$60,-000.00 has been taken from the bank in one manner or another by the sale to the bank of doubtful or worthless paper, or on his own note, or on some sort of paper or security that could be carried as an asset, which I think I would be safe in saying have no value as far as that amount of money is concerned. If I may explain my meaning, take a note of \$8,000.00 on which Mr. Stewart benefited \$1,000.00; there will be more than \$1,000.00 [98] loss on that. And if I may put that construction on it, the entire fifty-five or sixty thousand dollars is lost to the bank. (Testimony 43.)

The capital of the bank was \$25,000.00 and its

surplus was claimed to be \$25,000.00; and in my opinion Mr. Stewart abstracted from the bank a larger sum of money in assets than its entire capital stock and surplus. (Testimony 43, 44.)

In regard to Mr. Stewart's own indebtedness to the bank, Mr. Stewart had a note of \$6,000.00 in the bank which seemed to have been authorized by the Board of Directors, which he had placed in the bank in lieu of one that had been criticized; and in addition to that, Mr. Stewart had an account which he terms "Kelso Farm Company," which was merely a trade name for his farm, which owed the bank \$5,950.00; and then there was an overdraft of between thirty-two and thirty-three hundred dollars. (Testimony 44.)

Mr. Stewart had placed with the bank a guaranty in the sum of \$50,000.00. I have that instrument of guaranty here; it is dated May 26th, 1919, and that is Mr. Stewart's signature on it. (Testimony 44, 45.)

Copy of guaranty offered in evidence and marked Plaintiffs' Exhibit 17. (Testimony 45.)

Letter from Deputy Bank Commissioner Minchell, of date December 13, 1920, to Kelso State Bank, which was offered in evidence and marked Plaintiffs' Exhibit 18. (Testimony 45, 46.)

Being recalled the witness further testified: (Testimony 169.)

Q. Mr. Adams, you heard the testimony of Mr. Minchell yesterday, did you not, with reference to that Cue note, that the Cue note would be taken

out of the bank [99] and the note of the concern in which Cue was interested would be substituted, and that note be carried for a while, then the Cue note would be back again and the note of the concern would be eliminated. State whether or not there were other instances of that kind occurring in the bank?

To which the witness replied that he did not hear Mr. Minchell's testimony.

Q. Well, my previous question stated the purport of his testimony that I wanted to direct your attention to. Now, were there other cases of that kind?

A. Well, I haven't even found that one. The notes of Cue and the notes of the Hub Printing Company varied something, but I do not believe that I have found a time when the Hub Printing Company did not owe something after it began to borrow and I don't believe I found a time when Cue did not owe something. Both of their accounts perhaps were up and down. (Testimony 169, 170.)

Q. The general point I am trying to get at is whether there were not a number of such cases where, instead of real money being paid on account, it was kept apparently as a live obligation by changing the name of the borrower.

A. Well, I don't know what the object was, but the name of the borrower in the matter of Wallace and Moser and of Triumph Machinery Company

shifted about, but it was always considered by the Department, I notice, as one obligation. They were criticized, perhaps not always, and the bank had been criticized for carrying it as an excess."

(Testimony 170.) [100]

Further testifying the witness said: The abstraction of assets from the bank by Stewart ran as far back as 1913, and probably before that. It was a sort of a case of robbing Peter to pay Paul. The first abstraction that we have discovered was a case wherein Mr. Stewart put some note in the bank, apparently his own, and credited an estate of which he was administrator. We were not able to determine why he credited the estate, but we assume that he had used the money of the estate and was replacing it. He probably replaced that note with something else at a later date. was quite frequently done, that some of the paper that he was directly or indirectly responsible for would be paid by the substitution of something else which he was still responsible for in some form or other; and that condition obtained for a long time. (Testimony 170, 171.)

The great bulk of this took place prior to January 27th, 1921. I cannot remember whether I have found anything that he abstracted after January 27th, and before March 17th, 1921. (Testimony 171.)

On March 15, 1921, the deposits in Kelso State Bank were \$5,272.58; the checks were \$16,083.08.

On March 16, 1921, the deposits were \$7,828.61; and the checks were \$12,373.21. (Testimony 173.)

On cross-examination in response to interrogatories propounded by Mr. MILLER, the witness testified: (Testimony 173.)

The paper just handed me is a take-off or a transcript from the general ledger of the bank of the checks and deposits and of the balances from January 27th, 1921, to the day of closing; it was made from the general ledger of the Kelso [101] State Bank. The first column represents the checks paid on different dates set opposite; the second column represents the deposits on the same dates, subject to check; the third column represents the balances in each account for the respective dates. covering the period of from January 27th to March 17, 1921. The first column is checks, the second column deposits, and the third column is balance at close of business; the balance represents the total amount of that character of deposits in the bank at the close of business still remaining in the bank. There were other classes of deposits at that time, the saving deposits were kept separate; there were time certificates of deposits and demand certificate of deposits, together with Cashiers' checks and various things representing deposits of a minor nature. (Testimony 173, 174.)

There were eight hundred to one thousand general depositors in the Kelso State Bank, including the County Treasurer. There were three or four or five hundred depositors of saving bank

accounts. On March 14, 1921, savings are debited \$15.98, credited \$373.05 with balance of \$59040.57. On March 15, 1921, savings accounts were debited \$125.49, leaving a balance of \$58,915.08. On March 16, 1921, savings account were debited \$105.80, and credited \$6.91, leaving a balance of \$58,816.19. On March 17th, 1921, there were no changes. The total corrected balance in savings account at the time the bank was closed was \$59,667.61. (Testimony 175, 176.)

The total deposits on general checking account on the day the bank closed was \$254,665.58. There were \$32,605.00 in time certificates; in demand certificates \$6,549.49. [102] Woodland State Bank \$29.39. Unclaimed balances \$34.70, Cashiers' checks outstanding \$9,411.79; collection account \$46.80. That represents all the deposits unless you would call borrowed money or re-discounts deposits. There was an escrow account, which is a sort of unfinished business account, of \$3,713.03. (Testimony 175, 176, 177.)

On March 14, 1921, there was a demand certificate of deposit of \$200.00 paid. On the same day there was a time certificate of \$100.00 paid; and a time certificate of \$200.00 issued. Those are the only changes in the certificates for March 14, 15 or 16. Document showing copy of books and general deposits offered in evidence and marked Defendants' Exhibit "C." (Testimony 177.)

Other than in a letter from Grinstend & Laube saying that plaintiffs' deposit was a preference

and telling me what the law was, neither plaintiff or any other depositors who deposited funds in the Kelso State Bank on March 14, 15, 16 or 17, have made claims for preference because of deposits made on those days. At no time has there been any claim filed with me by these people for preference. (Testimony 178.)

Witness excused. [103]

## Testimony of H. S. Bennett, for Plaintiffs.

H. S. BENNETT, a witness on behalf of plaintiff, being first duly sworn, testified on direct examination, in response to interrogatories by Mr. Mc-CAMANT:

I am connected with the Banking Department of the State of Washington, in the Capacity of Bank Examiner; and have been such since March, 1920. As a part of my official duties I made an examination of the Kelso State Bank in November. 1920, which occupied about three days. I probed into the records of the bank as thoroughly as I knew how and prepared a report based upon that investigation, and Plaintiff's Exhibit 10 is a copy of the summary of that report. The report correctly represented the condition of the bank as far as I was able to ascertain at the time I made my examination; and its condition, as outlined in that report was called to the attention of Mr. Stewart and one other director. I think his name was Wallace. I called for a meeting of the board, and Mr. Stewart and one other director appeared 114 Fidelity & Deposit Co. of Maryland et al.

(Testimony of H. S. Bennett.) at the meeting and I laid before them the purport of that report. (Testimony 47, 48.)

On cross-examination, in response to interrogatories propounded by Mr. MILLER, the witness further testified. (Testimony 48.)

I do not offhand remember the name of the other director who was present at that meeting; and exhibit No. 10 will show his name. The witness examined the report and said: "The other director present was Mr. James Wallace." This was the only time I made an examination of the Kelso State Bank; the other examinations were made by other officers of the Banking Department of Washington. (Testimony 49.)

I do not know whether the claims mentioned in that report were collected by the bank before it failed or whether [104] any of them have been collected since. At the time of the examination, Mr. Stewart and the other officers of the bank felt that the bank was perfectly sound at that time; there was nothing about it which caused me to close its doors; they were allowed to run after that examination, and they seemed to all feel that it would pull through all right. I had no opinion about it. (Testimony 50, 49.)

On redirect examination, in response to interrogatories by Mr. McCAMANT, the witness further testified:

I sent for Mr. Hay and Mr. Minchell to come down and see what there was there. That is done in cases where we are unable to obtain infor(Testimony of H. S. Bennett.)

mation that is satisfactory to us. This examination was a very difficult and hard examination to make. The information on the loans was very general, and might be applied to almost any kind of a loan it seems to me. (Testimony 50.)

Mr. Minchell came down and assisted me in the examination. I do not know where Mr. Hay was at that time. He was not in Olympia when I called for him. (Testimony 51.)

On recross-examination, the witness further testified:

When Mr. Minchell got down there, he arrived about one o'clock in the afternoon and we stayed about three or four hours going over the examination; during that examination we picked out notes that seemed to be slow, doubtful or undesirable assets. As far as Mr. Minchell and myself could tell, the directors seemed to feel that the thing was going to pull out all right. (Testimony 51.)

(Witness excused.) [105]

## Testimony of Claude P. Hay, for Plaintiffs.

CLAUDE P. HAY, a witness on behalf of plaintiff, being first duly sworn, testified on direct examination, in response to interrogatories propounded by Mr. McCAMANT: (Testimony 52.)

At the end of 1920 and the beginning of 1921, I was Bank Commissioner of the State of Washington. I ceased to be Bank Commissioner on March 31, 1921, as the result of legislation. After

I ceased to be Banking Commissioner I was appointed Deputy Supervisor of Banks of the Banking Department of the State of Washington; the office of Commissioner was abolished by the legislature, and the new office of Supervisor of Banking was created. (Testimony 52.)

Prior to the time I became Bank Commissioner I was connected with the Department as an examiner. My first service with the Banking Department of the State of Washington began in 1908, and I was connected with the Department off and on from that time on until the time I was promoted to take charge as the head of the Department. I was out a year once or twice liquidating banks. Plaintiff's Exhibit 9 is a letter based on examination made by me of this bank in 1919. At that time. I found the condition, in a general way, the most unsatisfactory in the matter of the character of their assets; that is, the loans and discounts were such that I questioned very much the value of a great many of the items which I found there; as a whole they were nonliquid, very slow of collection. (Testimony 52, 53.)

As Bank Commissioner, I received a report made by Mr. Bennett in November 1920, of an examination made by him in that month. I personally examined the bank at least three times, possibly more or participated in examining it. I cannot recall being consulted [106] about Plaintiff's Exhibit 18. I know that when the examination was made, I directed that the proper letter be

written. It is possible that I did not have anything to do with it; I cannot say at this time. I remember the circumstances of a conference at Olympia in my office, when a visit was made to my office by Mr. Lou Plamonden, at which time I am not certain whether his brother was with him or not. As I recall it, there were two conferences. At the first, I do not think George Plamonden was present; but at the second one, I am positive that George Plamonden was there, and I am inclined to think that Lou Plamonden was there also. I know that George Plamonden resigned or intended to resign or had handed in his resignation and at my request it did not become effective, and he agreed to stay with the Kelso State Bank for a short time. I am inclined to think that it was at the time of the first interview in Olympia that I was advised of Mr. George Plamonden's contemplating resignation. He was assistant cashier. I cannot say that he gave me any reason himself. I am not clear just how I first became aware of the fact that he was going to resign, whether he told me or whether I got it through his brother or whether I saw the written resignation. At a later date, however, his brother did make some remark about why it was desirable for Mr. George Plamonden to leave the bank. If he made the statement at the time I think he made it, then George Plamonden was present, and they were both present at the same meeting. The statement at that time that the way things were going on there he did not want George to

remain in the bank, he would not have any brother of his working there, or something of a remark like that. (Testimony 55, 56.) [107]

As I recall, the visit of Mr. Lou Plamonden to me the first time was for the purpose of obtaining or discussing the purpose of obtaining a third charter for a bank in Kelso. There was a conference held about March 6, 1921, at Chehalis concerning the Kelso State Bank. I was very much dissatisfied with the way things appeared to be going there, and I determined to get in touch with the directors of that bank through some other medium than Mr. F. L. Stewart, the Cashier. I felt that Mr. Stewart had not carried out my instructions in putting before the board instructions that had been given, certain information that I wanted the board to have, and consequently I made arrangements to have certain members brought to meet me in Chehalis without the knowledge of Mr. Stewart. The reason for holding the meeting in Chehalis was simply because I did not care to appear in Kelso for the reason it might cause some comment and have a bad effect on the bank as it sometimes does in small towns. The Chehalis meeting was held March 6, at the St. Helens Hotel, at which were present Mr. Carothers, President of the Bank, Mr. Plamonden, Assistant Cashier of the Bank, and Mr. George Marsh, a director of the Bank. There was also present at that conference besides myself, Mr. Minchell, Deputy Commissioner. At that meeting, I called the matter to

their attention rather forcibly, the fact that the condition of the bank was such that I was very much concerned, and that I wanted them to know directly from me that something had to be done and done quickly, and that that something was a matter of raising sufficient money to take out the objectionable assets. I could only go so far as levying an assessment, and I agreed with them that an assessment would be levied immediately upon [108] my return to Olympia, which was done, on March 7, a one hundred per cent assessment was levied, which was the limit the Bank Department could levy at that time. (Test'y 57, 58.) I do not recall just exactly what transpired in regard to what could be done about Stewart. It was generally understood that I wanted Stewart removed from that bank and always had felt that he should be removed, and I afterwards demanded his resignation, I think on the following day or on the same night. I remember also at that interview in regard to the condition of the bank, that Mr. Marsh entered into quite a lengthy story in regard to his connection with the bank, and how he acquired his stock; but I do not remember now just exactly what he did say. I would not say that he said anything about having recently acquired knowledge of the condition of the bank. I know that he had some time prior to that suddenly discovered that the bank was not in the excellent condition which he had always supposed that it was; but just when he had discovered that, I do not recall that he stated. (Test'y 58, 59.)

I think Mr. Minchell wrote the letter to Mr. Carothers dated March 7, 1921. I know that the matter was discussed at that conference and I had made up my mind to levy an assessment on the following day, March 7, and when that formal notice of assessment was mailed, I believe a letter was written Mr. Carothers for the purpose of putting the Department on record in writing, as we had no evidence except statements Mr. Minchell and I might make. (Testimony 59.)

After the conference in Chehalis I called Mr. Stewart on the telephone and arranged to have him meet me at Olympia night, Sunday night March 6, and he came to Olympia. At that time I gave him to understand that he had to eliminate himself [109] from the Kelso State Bank. I wanted to have it done without any publicity but it was understood between him and I that he was to leave the institution. I also told him at that time that an assessment was to be levied the following day. The assessment was levied on the following day, and ten days I think were given for the collection of the assessment. I think that the next thing that came up was a visit from Mr. Plamonden, possibly both George and Lou, and I think a gentleman named Adams was also present, who had during all this time been attempting to reorganize the new bank to take over the Kelso State Bank. I think they had not met with success principally in raising the capital, and I think possibly their investigation of the assets had caused them to slow up, or at least lose

a little of their enthusiasm in regard to taking over the bank. There was some conversation then, but I am not clear what that was about. As a matter of fact, it may be that the appraisal of those assets was not made until after that interview. I received a letter from one of the Plamonden's which gave an appraisal of the assets which was anything but satisfactory, either to the purchaser of the bank or to the banking department from its standpoint. The gentleman by the name of Adams I mentioned, I think is in the hardware business in Kelso, located directly opposite the bank. He is not the Mr. Adams who was on the witness stand in this case this afternoon. (Testimony 59, 60, 61.)

I think the same time that this letter was received, I also received a letter from Mr. George Plamonden asking me to come to Kelso if possible that night, giving me train schedules and so forth, because of the fact that they had been [110] unable to collect this assessment which I had levied, and the time was drawing near for a show-down, you might say. I immediately went to Kelso, the night of the 16th; and I believe I arrived in Kelso somewhere about eight o'clock in the evening. (Testimony 61.)

When I arrived in Kelso, I met Mr. Plamonden and Mr. Stewart. I don't recall whether Mr. Carothers was there or not. He may have been. We went over the affairs of the Bank, merely the assets, the note part, you might say, and it did not take me very long to determine that some mighty fast work had got to be done. Before the night was

over, I had told them that unless they were able to collect the twenty-five thousand dollars before the opening hour the next morning. I would tack a sign on the door, because I felt that the bank was in no shape to continue to receive deposits. That was my opinion then and it is still my opinion. I do not think they had anything to propose in the way of a solution of the problem. One of their stockholders was a man reputed to be worth a great deal of money, and I believe he was heavily interested in the community, he was the President of the other bank there as I recall it and he was in Portland; and I felt that possibly his interest in the general situation might make him the key to the whole thing, that he might possibly be able to assist the bank in some way to prevent a failure, which was the thing we were trying to get away from if there was any way. We worked on it until I suppose one or two o'clock in the morning, and then retired, and I believe I got up about four or five o'clock in the morning to catch an early train to Portland, accompanied by Mr. Stewart. We interviewed this Gentleman. [111] who was Mr. E. S. Collins; and we found from that interview that there was no help coming from that source, so I returned to Kelso. I first had Mr. Collins get in touch with his Cashier at the First National at Kelso and with the Banker at Castle Rock, Mr. Buland, and arranged to have them meet me, when I was in Kelso, to determine whether or not there was anything they could do to help the situation, and also in order

to let them know what might possibly happen if we could not get at the last minute something that would save the thing. When I arrived there, I found we had gone our limit. I went over and put the sign on the door, I presume about twelve-thirty or one o'clock, on March 17, 1921. (Testimony 62, 63.)

The last time I saw Mr. Stewart, I left him on the street, shortly after leaving Mr. Collin's office; I do not recall what street it was. I was on my way to the depot, and I am not familiar with the streets in Portland, it was one of the streets down from the Imperial Hotel, I think at the corner of Broadway and something, I left him there, and he felt very confident that he was going to raise the money through some bankers. To my knowledge, he never returned to Kelso. I returned to Kelso on Wednesday and I stayed there until Saturday, when I went back to Olympia for over Sunday and returned to Kelso the next day; I was in charge of the bank from then on until Mr. Adams took charge of the liquidation some time in April, I do not recall the exact date. During all of that time Mr. Stewart never returned to Kelso. He came with me to Portland for the purpose of getting financial assistance for the bank and that was the last I saw of him. I had a talk with him over the long [112] distance telephone after I separated with him here in Portland. He called me up about three o'clock on the 7th, and asked me about how things were up there, or something of that sort;

I told him that I had closed the bank and he said, "Well, that is too bad, because I have got the money." I said, "All right, come on up with me if you have got the money with you and perhaps work this thing out," and he told me he would be up on the evening train, but I never saw him again. (Testimony 64, 65.)

Mr. Duke became the head of the Department on April 1, 1921, I remained as regular deputy in the department, but continued to handle the work at Kelso State Bank until such time as I was able to find someone we could put in charge. (Testimony 65.)

At this meeting in Chehalis, on March 6, 1921, I do not recall now just what I told the directors at that time except that they had to have twenty-five thousand dollars more in capital in there to make up the losses; that is, that it would take the maximum assessment which I could make to satisfy me at that time. I don't know what I would want to say that twenty-five thousand dollars would make the bank safe; but that was the maximum I could levy, and that was the best I could do in the interest of the stockholders. (Testimony 65.)

The second conversation at Olympia at which George Plamonden, Lou Plamonden and Mr. Adams were present occurred after the 7th, after the assessment was levied, and before we closed the bank; I could not say whether it was before or after the 12th; it was very close to the 12th. (Testimony 66.) [113]

On cross-examination, in response to interrogatories propounded by Mr. MILLER, the witness testified:

I have known about the Kelso State Bank and its management in a general way almost ever since I was in the department, in 1908 or early part of 1909. I left the Department in 1909 and returned to it in 1911 or 1912, and it may have been that it was not until 1912. (Testimony 66.)

I do not think I made an examination of that bank prior to 1914; from 1914 on down to the time the bank was closed I made several examinations. The law required us to make an examination at least once a year, and we complied with the law. How much oftener than that, I cannot say, perhaps some ten or eleven months apart. In making those examinations, I made one or two examinations alone, and there was one examination I made with another Examiner, Mr. Motherwell. There are three examinations that I am positive of. (Testimony 66, 67.)

I was head of the banking department of the State of Washington from March, 1920, to March 31, 1921; and during that time, if I did not make the examinations, I received reports from those who did make the examination. (Testimony 67.)

Some of these slow notes in the Kelso Bank were there for several years. I would not want to say that I would discover all those old notes or renewals of the same notes at my examinations; but some of them had been in there for several years;

possibly not continuously but they went out and came back again. I do not mean that they were changed by renewals, what I mean is this: A note was criticized and it would disappear from the assets. Presumably it was paid. Later on it would appear again in the assets, and apparently [114] Mr. Stewart arranged to have it carried outside of the Bank and then later on it would be back in the bank again. I did not notice that at first when making these examinations; that only came out as more examinations were made. During the year 1920, I think practically all of the notes I finally criticized were in the bank, and had been even before that time. There had never been a run on the bank to my knowledge. Conditions at the time I ordered the assessment were practically the same or very similar to what they had been for a year, a year and a half or two or three years prior, so far as the financial condition of the bank was concerned. I do not recall that the question as to the amount of cash reserve ever entered into my criticism of the bank; it was the character of the assets I objected to primarily, that and the management. I was not satisfied with the management. thing that I was complaining about was that the bank ought to get rid of this paper which was bad and it had been carrying for a long time; and what led me to make an assessment on the stockholders was that I had determined to eliminate certain assets, once and for all. My purpose in ordering this assessment was not because I contemplated

that the bank was going into immediate insolvency or anything of that kind, but it was to enable me to get rid of some bad paper in the bank. I did not have any contemplation at that time the closing of the bank. I had not contemplated closing the bank at any time. (Testimony 69, 70.)

I did not discover that the stockholders could not pay the assessment until I was called to Kelso by the letter from Mr. Plamonden, dated March 14th, asking me to come down there, because they needed me, or they were having trouble [115] about something. I do not recall the letter of March 14, this letter that you have just handed me. I heard it discussed recently, but what I mean is I don't remember what I did at that time or anything about it. As a matter of fact, I rather think that it came in after I had taken some other action. After examining this letter, I will say I undoubtedly saw it, but I do not recall it. (Testimony 70.)

Letter referred to by the witness was offered in evidence and marked Defendant's Exhibit "A." This letter, Defendant's Exhibit "A," is a letter from Lou Plamendon, who was operating a bank at Woodland; and in it they ask for five days more time in which to collect the assessment. I made the levy for the assessment on March 7th and gave them ten days time, which would be up on March 17th. I do not recall that the contents of this letter entered into the matter at all. Evidently I did not give it enough consideration at that time so that I even remember about receiving the letter. (Testimony 71, 72.)

I think I went down to Kelso on the 16th in response to a letter from Geo. Plamonden, which letter I think was dated March 14th. When I got there I found that they were not able to raise the assessment that I had levied; I know that Mr. Stewart was not able to raise his, but I do not know how far they were successful toward collecting others. I did not conclude that the bank ought to be closed until after I talked with Mr. Collins, who was one of the stockholders. After seeing him and talking with him, I was satisfied that that was my only course. Up until that time, with all that I knew about the bank, I did not feel that there was sufficient justification to close it: and none of the [116] officers felt that way; they all believed that it would work out. Until the very last, I think they were confident that it would work out. (Testimony 73.)

I do not remember that I ordered any deposits made on March 17th, returned; at least \$134.00 was not returned; but the balance of it was. (Testimony 73.)

When I left Mr. Stewart in Portland, he said he was going out to raise the money and he thought he could. (Testimony 73, 74.)

I was satisfied for a long time before that it was not for the best interests of the bank to longer keep Stewart in there as Cashier and General Manager. That was only one of the things that the meeting was held for. There were two objects for holding the meeting, one was to levy an assess-

ment to get rid of some bad paper; and the other was to get rid of Stewart. I would not say there were any other reasons. If there were, they were minor reasons. (Testimony 74.)

The closing of the bank was not contemplated until the last day. My meeting with Mr. Geo. Plamonden, Assistant Cashier Kelso State Bank, and his brother Lou Plamonden, was between the 7th of March and the 14th; although I am not clear in regard to the date of that meeting. Lou Plamonden said that he did not want George Plamonden to stay there any longer in the bank; I think it was Stewart's presence there that they were particularly objecting to, and Lou did not want his brother to be longer tied up with Stewart. The condition of the bank had considerable to do with it also at the time of that conversation. As far as I know, Lou Plamonden had never gone over the bank papers at [117] that time. (Testimony 75.)

My recollection of it is that it was about March 1st, when George Plamonden either tendered his resignation or said he was going to hand it in. As a matter of fact, he continued as Assistant Cashier up until the bank was closed at my request. As far as I know, he never presented his resignation to the Board of Directors. I cannot say whether he presented it or not. That may have been what he did in the first place, and I was advised of it. I wanted to have some one to check Stewart, and I felt I could rely on Mr. Plamonden at that time. I did not like Mr. Stewart's methods, and I

did not trust him, and while I had nothing on him, I knew there was something wrong somewhere. The only thing I knew about it was that there was a lot of these notes that we contended were bad and which he said were good; and some were bad and they had been in the bank a long time. I wondered at the time whether what they had in mind was that George and his brother were thinking of taking this bank over and getting rid of Stewart, and that George staved in the bank with the idea that they would acquire the bank and get title to the bank and get rid of Stewart. It went so far as to have Lou Plamonden of the Woodland Bank, go over the papers to see if he wanted to go into the reorganization of the bank, or purchase the bank. (Testimony 76, 77.)

I possibly should explain Lou Plamonden's connection with the examination of the assets. I think at that time it was partly that he was called in to help the situation out at Kelso, too, in addition to possibly take over the bank. It was a twofold purpose. He had in mind to get the bank if he could get it, he and his brother; and on the [118] other hand there was a question of assessment having been levied, or Stewart not being able to pay; there was a question of what he might do toward possibly taking over Stewart's stock, or something of that kind, that the examination was made; it was not entirely for the purpose of getting hold of Stewart's interest that this examination was made; it was a question of saving the bank, or prevent

the closing of it. Lou Plamonden was not connected with the bank in any manner, either as a stockholder or officer. (Testimony 77, 78.)

On redirect examination, in response to interrogatories propounded by Mr. McCAMANT, the witness testified:

The letter of date March 14, 1921, from Lou Plamonden, was received by me.

The letter identified by the witness was offered in evidence and marked Plaintiff's Exhibit No. 19. (Testimony 78, 79.)

Letter dated March 14, 1921, from L. M. Plamonden to the witness was identified by the witness, and was offered in evidence and marked Plaintiff's Exhibit 20. (Testimony 79.)

I do not recall receiving the enclosures that went with this letter, Plaintiff's Exhibit 20, report of examination of notes and bills receivable. I know there was some sort of an examination sent in with it. There was a list that went with this letter, of the assets and liabilities. (Testimony 79, 80.)

The witness identified letter of March 14, 1921, from Geo. Plamonden, which was offered in evidence and marked Plaintiff's Exhibit 21. (Testimony 80.) [119]

I do not think there is any question about my writing this letter which you have shown me, dated March 15, 1921.

Letter was offered in evidence and marked Plaintiff's Exhibit 22. (Testimony 81.)

The witness was then shown letter of date March 15, 1921, signed by the witness, and addressed to F. M. Carothers.

I do not recall writing this letter; it is in the same class as the other; it is evidently a copy of a letter I did write. I think there is no question about it.

The letter identified by the witness was offered in evidence and marked Plaintiff's Exhibit 23.

On redirect examination, in response to interrogatories propounded by Mr. MILLER, the witness further testified:

Q. In the letter of March 15, 1921, addressed to Mr. Carothers, the President, you say in that letter: "I am just in receipt of a letter from Mr. L. M. Plamonden in which he states that it is your desire that this department give you an extension of five days for the purpose of collecting the assessment levied against the stock of your bank. Mr. Plamonden suggested that I telephone you which I agreed to do. However, on second thought I have decided it might be better to advise you by letter, rather than take a chance of there being eavesdroppers who might hear our conversation over the wire. I trust you will be able to complete the collection of your assessment within the additional time allowed." So you did give them five days more? A. Yes, apparently.

Q. And that would not have expired until the 22d of March?

A. Twenty-second of March. (Testimony 81, 82.) [120]

Being recalled, the witness testified further as follows: (Testimony 163.)

From my examination of the affairs of the Kelso State Bank made during the month that I was in Kelso from and after March 16, 1921, at which time I spent that whole entire month familiarizing myself with its affairs, I found that the bank was in a hopeless condition. If I had known those facts in January, 1921, as I found them to be in March and April, 1921, I would have then done the same thing that I later did in March; after giving a reasonable amount of time, I would have closed the bank. In testifying, as I did before to the effect that I thought the officers of the bank expected the bank was going to pull through when I came there in March, I think that testimony had to do with my opinion as of date that I closed the bank, on the night of March 16, 1921, when we had the conference. So far as I was concerned, Mr. Stewart had ceased to exist after I demanded his resignation. In testifying as I did, I did not include Mr. Stewart and did not have him in mind. I should think that Mr. Stewart was thoroughly conversant and knew the conditions of that bank, and knew the facts. (Testimony 163, 164.)

On cross-examination, the witness further testified:

I presume Mr. Stewart did think up until the time that I took charge of the bank, that the direct-

ors of the bank possibly did believe that they could save the institution. I do not know that I would want to say that I had every reason to think that Mr. Stewart thought so. While Mr. Stewart made the statement that he thought he could get money to go on, or something of that kind. I did not have much confidence in his statement, nor in his getting the money. To my knowledge, there had been no run on the bank, and I would not say that [121] there was any material change in its condi-I 'expected, or at least I thought, there was a reasonable chance of saving the institution. If I had not thought that, I would have closed it down then. I simply gave them the amount of time I thought they were entitled to. I did not have all of the information in January that I had in March. For instance, March 14th, I had received this independent appraisal of Mr. Plamonden who had been figuring on the reorganization of the bank. It is true that I had been examining the same securities off and on for five or six years; but I had never been able to get the board of directors together, so I did not go and talk to them personally about it. The Plamonden report was not the same report that I had been receiving for years back; there was information supplemental to the report. I rather believed that this one hundred per cent assessment which I levied on March 6th, would be sufficient in amount to keep the bank going; but when I found they were unable to meet that assessment, I then concluded to close the bank. It is true that the

time they were given to meet that assessment had not yet expired, but they had, in my belief, come to the conclusion that they were not going to be able to collect more than half of it; and I then thought the bank ought to be closed. I would not say that I thought the condition of the bank was hopeless before I closed it. If I had thought it was hopeless prior to that time, I would have closed it sooner. The vital part of the information upon which I acted was not received until March 14 or 15th; I presume it was the 15th when I first saw it. Mr. Plamonden went in there as a prospective purchaser. I had been there as Bank Examiner a number of times before looking over the securities. (Testimony 167, 168.)

(Witness excused.) [122]

## Testimony of J. C. Minchull, for Plaintiff.

J. C. MINCHULL, a witness on behalf of plaintiff, being first duly sworn, testified:

On direct examination, in response to interrogatories propounded by Mr. McCAMANT, the witness testified:

I am deputy supervisor of banking, State of Washington; I have been connected with the Banking Department of the State of Washington since November, 1919; however, not in my present position all of the time. I was called to Kelso by Mr. H. S. Bennett in November, 1920, to assist in an examination of the Kelso State Bank. Upon my arrival, I immediately went into conference with

Mr. Bennett and Mr. Knapp, the Examiners, and also Mr. Stewart, the Cashier of the Bank. I called Mr. Stewart's attention to the more important phases of the situation at that time. My criticism was particularly directed to certain loans that were disclosed by the report of the examination. The question in my mind was as to the real value of those loans as assets. In the light of information we had received they were indeterminable; we could not determine really what their value was. My insistence in talking with Mr. Stewart was that unless he could disclose to us that these were proper assets for the bank to carry, that we were going to insist upon their being eliminated. When he would make statements to me about the assets being all right, I felt that his contention regarding the assets might be genuine in his own mind; but I could not feel that his value of the assets was correct; and I recall quite distinctly telling him that I believed he was kidding himself as to the value of those loans as assets. (Testimony 83, 84.)

I was present at the interview at Chehalis on Sunday [123] March 6, 1921. Mr. Marsh, one of the directors of the Kelso State Bank was present. After that conference Mr. Hay stated to the gentlemen present that in his opinion it was necessary that an assessment of one hundred per cent be levied to take care of the probable losses; and I recall that Mr. Marsh's remark was to the effect that it would take all of that, or to the effect that there would not be enough; words to that effect. I cannot recall his

exact words. His statements were to the effect that he was willing to pay his one hundred per cent and that the stock owed him nothing; that is, that he could then turn in his stock and still be money ahead with regard to his purchase of the stock. I do not know that he made any definite statement in regard to what he was going to do after he paid the assessment with reference to the stock. My recollection is that his remarks carried the inference that he would turn in his stock, that he was willing to pay the one hundred per cent. (Testimony 85.)

I do not remember that he said exactly that he was going to give away his stock after he had done that, but that was the impression I received, however, from his conversation. (Testimony 85, 86.)

When I was present at the bank, I found Mr. Stewart and Mr. Plamonden in control. We did business with them. Our conversation was with them, and also with Mr. Wallace, one of the directors. Mr. Stewart, however, was the person to whom all our remarks and criticisms were directed: we looked to him as being in control; he was the executive head of the bank. As far as I know, Mr. Plamonden was there every day. I was not acquainted with the force in the bank at that time. [124] I met them in the directors' room and paid no attention to the force at that time. I could name them from the record, but I do not know of my own personal knowledge just who was there except Mr. Stewart and Mr. Plamonden. (Testimony 85, 86.)

The letter introduced in evidence under date December 13, 1920, was written by myself; and that letter was based on the information contained in the report of the examination, and also the information obtained at this conference following the examination; and further I took into consideration at that time information contained in the four reports of examinations made by previous examiners. My recollection is that I used a sheet of paper, and using the dates of the reports of the examinations, I showed the total obligations of certain of these borrowers at an examination in 1918, 1919 and this one, and possibly former examinations. (Testimony 86, 87.)

The conclusion I drew from all the information I had available was that the notes constituting assets would be changed and interchanged, sometimes in character and sometimes in amount, so as to give the appearance of the assets of the bank not being the same ones at all, but they were in fact the same. For instance, at one examination, there would be an obligation of M. E. Cue, in a certain amount; at the next examination, that would disappear entirely, and we would find the obligation of the Hub Printing Company, which was a newspaper owned by Mr. Cue. (Testimony 87.)

From my examination, I could not conclude that any real money was being paid on these old bills receivable and they were actually being reduced. I tried to determine that, but I could reach no con-

clusion; my inference was that there [125] was any bills being reduced. (Testimony 87, 88.)

I recall at one time a Mr. L. M. Plamonden, the brother of George Plamonden assistant Cashier Kelso State Bank was in my office at Olympia, and my recollection is that he at that time displayed to me a copy of a written resignation which George Plamonden had turned in to Mr. Stewart; I cannot fix the date of that. It was following the conference at Chehalis of March 6, and following the correspondence had on March 7th, but I could not fix the date definitely as to that. (Testimony 88.)

I cannot recall a time at which any conference was held when both L. M. Plamonden and George Plamonden were both present. I had conferences with both of them but whether in the presence of each other I cannot distinctly recall. They were both in the office on the same day in company with Mr. Adams. At my interview with Mr. George Plamonden and Mr. Adams, it was with reference to the raising of capital, and a reorganization of the bank. They had returned from a trip from Bellingham and informed me that they had not been entirely successful in raising the capital they had hoped for. (Testimony 88, 89.)

I recall the letter of March 14, 1921, written by Lou Plamonden transmitting a statement of assets and liabilities of Kelso State Bank. As I recall it, there was a list of notes submitted with this letter. I do not recall anything as liabilities. I think the letter contained a list of part of the assets and an

estimate as to what they were worth, which ones were good and which ones were not. I have seen that in our files, and have searched them but have not been able to find it recently, since it has been asked for. (Testimony 89.) [126]

On cross-examination in response to interrogatories by Mr. MILLER, the witness further testified:

I cannot fix definitely the date of the conversation with the two Plamondens at Olympia; it is my recollection it was following the meeting at Chehalis. George Plamonden was present at the conference in Chehalis; Lou Plamonden was not there. After that meeting I believe George Plamonden returned to Kelso. Sometime after that they both came to Olympia, but I could not fix the date definitely. They had gone to Bellingham in the meantime. The purpose of that trip was to interest the capital in the reorganization of a new bank at Kelso. that regard, the talk of taking over the capital of the Kelso Bank developed later. It was my personal conclusion that they wanted to get Stewart out; but I do not think there was anything developed. I did not talk with George Plamonden about his resignation; I talked with Lou Plamonden, who was not connected with this bank in any manner, but my inference that he was trying to get connected with it by buying an interest in it. (Testimony 91, 92.)

Mr. Lou Plamonden had been permitted by Mr. Stewart to go in the bank and make a list of its

(Testimony of J. C. Minchull.) assets which was the list sent to my office. (Testimony 92.)

Personally I made no examination of the Kelso State Bank. I was called in following the examination of Mr. Knapp and Mr. Bennett on November 19, 1920, and that was the only time I ever examined the assets of the bank. At that time I really made only a partial examination of such assets that I felt were subject to criticism, and I discussed them with Mr. Stewart and tried to impress upon him the fact that I did not believe they were the proper assets. I did not make an [127] examination of the general assets and liabilities of the bank at that time, but only of certain paper I called his attention to, which had been in the bank some time; slow paper. (Testimony 92, 93.)

Mr. Stewart was very insistent that he would be able to collect on these papers, his statements were that always he felt that he could work those papers out. I believe he was sincere in his belief, but I felt that he was deceiving himself. He thought he was a good trader. This meeting in Chehalis was partially for the purpose of getting rid of some of this slow paper; and I remember having discussed with Mr. Carothers and Mr. Marsh and Mr. Plamonden what they thought as to the advisability of getting rid of Mr. Stewart as the managing officer of the bank. We thought that that was one of the bad features of the situation. We felt that Mr. Stewart ought to be superseded by some person competent to properly handle those slow items; but more es-

pecially as to the general management of the bank, centered around these assets, the value of which we could not determine. (Testimony 93, 94.)

There was no thought at that time of closing the bank; I do not believe the subject was mentioned at all by anyone; what we wanted to do was to work out a plan to get rid of some of this slow paper, and with it, Mr. Stewart; because we felt it would be to the best interests of the stockholders and depositors to have a change in the management. (Testimony 94, 95.)

Mr. Marsh made some reference to his stock; he said something to the effect that he could pay his one hundred per cent assessment and still the stock would not owe him [128] anything. I believe that is about the expression he used. He may have told me how he got hold of that stock; but I do not recall distinctly what it was; my conclusion was that he got it in such a way that it would not cost him anything, this additional one hundred per cent. (Testimony 95.)

On redirect examination, in response to interrogatories propounded by Mr. McCAMANT, the witness further testified:

Under our law we do not have the option of chartering another bank at Kelso. There are certain requirements which, if met, we were obliged to grant a charter; so we always try to avoid discussing that, if possible. We would like to use

(Testimony of George F. Plamonden.) our discretion, but in the final analysis we are not allowed to.

(Witness excused.) [129]

## Testimony of George F. Plamonden, for Plaintiffs.

GEORGE F. PLAMONDEN, a witness called on behalf of plaintiff, being first duly sworn, on direct examination, in response to interrogatories propounded by Mr. McCAMANT, testified as follows: (Testimony 98.)

I was Assistant Cashier of Kelso State Bank; and had been such assistant cashier for somewhere around six years. On and after the 27th of January, 1921, the active force in charge of the running of the bank from day to day was Mr. F. L. Stewart, Cashier, myself, Mr. George Plamonden, Assistant Cashier, Eldon Dunham, teller and Miss I. Waugh, teller; we also had a stenographer, but I cannot remember her name. She was there a short while. The president of the bank was not there from day to day; the executive head of the bank, the man who took the responsibility was Mr. F. L. Stewart. (Testimony 98, 99.)

Prior to the closing of the bank, and as near as I can recall on or about March 4, in the later afternoon, 1921, I prepared and presented to Mr. Stewart, Mr. McCamant and advised the banking department thereof, my resignation of my office, as Assistant Cashier. (Testimony 99.)

During the month of March, 1921, I recall having one conversation with Mr. Linus Perry Brown,

County Treasurer, with reference to making additional deposits of county funds. Mr. Stewart asked me to go to Kalama and ask Mr. Brown about arranging for county funds. Mr. Stewart asked me to make this request of Mr. Brown, that the bank be allowed to receive its quota of county deposits in due course, and that Mr. Stewart would repurchase the warrants from his corresponding banks and then deposit them with him. Mr. Brown very rightfully refused to do that, saying [130] that he could not do so under the law, because there would be an interim during which he would have no security, the interim between the time that the bank would take the warrants back and deliver them to him. For instance, in explaining why I say that the county treasurer rightfully took that position, let me presume that our surety bonds were in the amount, of Seventy Thousand Dollars, that we had on deposit with the County Treasurer, covering his county deposits. Now, he could deposit with us up to that amount under the law. believe the law is such in Washington that he cannot deposit unless he had securities to cover his 'deposits. Now, Mr. Stewart's idea was that Mr. Brown deposit with us over and above the amount of our surety bonds, and then Mr. Stewart would take down his warrants; that we would repurchase them under what is called a repurchase agreement: but in the event that Mr. Brown would have consented to do that, there would have been an interim between the time he would make the deposit

and the time he would receive his additional securities that he would not be secured on the deposit over and above the amount of his securities. I do not recall that there was any conversation in which Mr. Brown said what he could do, if anything, along that line. I delivered my message and received my answer; as I recall, that was the extent of our conversation. (Testimony 99, 100, 101.)

Following the conference at Chehalis on March 6, 1921, at which conference I was present, after that conference I, my brother, and Mr. Carothers, made an examination of the assets of the Kelso State Bank. I do not know that I could give you the exact date when we completed that examination; but I can give you the approximate date, which I would say was [131] around the 14th or 15th of March. I cannot say the exact date; I really do not remember. I know that we worked almost all of one night on this work of examining the assets. My brother was in conference with me upon this subject; we worked together; Mr. Carothers, Mr. Stewart, my brother and myself made the examination. (Testimony 101, 102.)

Plaintiff's Exhibit 21 is a copy of a letter I wrote under date of March 14, 1921. I believe Plaintiff's Exhibit 20, letter dated March 14, written by my brother, and plaintiff's Exhibit 19, a letter dated March 14, to have been copies of letters written by my brother. After refreshing my memory by reading those letters, I would say that in the event that

these dates are correct, that we completed the date of the examination of the assets and liabilities of the Kelso State Bank on the night of March 13th. (Testimony 102.)

That examination which we made showed that in our estimation there was a great deal of objectionable paper among the bills receivable of Kelso State Bank. We figured that there was somewhere around One Hundred Thousand Dollars worth of paper that it was very questionable if collections could be made upon. We figured that there was something a little over One Hundred Thousand Dollars that we figured would be paid, but that was most probably slow. In our estimation we considered it to be good, but we considered it to be slow. (Testimony 102, 103.)

But of the parties who participated in that examination, we did not all agree in these conclusions. Mr. Stewart objected quite strenuously to a great many of our ideas. A large part of the paper that we thought was worthless in our opinion, Mr. Stewart insisted that in his opinion would eventually [132] be paid. It was largely a matter then of a difference of opinion. Mr. Carothers, I think, coincided with my brother and myself in those opinions; he thought there was One Hundred Thousand Dollars of uncollectable paper. (Testimony 103.)

Prior to the month of March, 1921, and during the winter of 1920 and 1921, it was difficult to main-

tain the legal reserve in the bank; the bank rediscounted warrants and loans quite extensively for the purpose of maintaining and having sufficient reserve. There was bound to be an increasing difficulty in doing that for this reason, that a bank's credit is just like an individual's credit. I will say that our correspondent banks were mighty fine to us. As time went on, of course, it naturally grew a little more difficult to increase our line of credit. During that winter of 1920 and 1921 it seemed to me that there was not sufficient effort made to collect much money from bills receivable. I have not charged my mind with how much was collected and how much was not. (Testimony 103, 104.)

About a week before the bank closed, I would say, from the 10th to the 12th, around there some place, I had a conversation with Mr. Stewart relative to what he would do in the event of the worst coming to the worst. On this particular day, it seemed to me that Mr. Stewart was looking very badly, and the thought just came to me I would go back to his desk and talk matters over with him a few minutes. and see if I could not cheer him up. I went back to his desk, and we talked for a little while, and I thought he seemed rather blue; and finally I say, frankly, I said, "Fred, in the event it were possible that you could not do your part in [133] this, you would not do anything rash, now, would you?" As I remember that was just about the exact words I used, and Fred laughingly told me that I need not worry about him, that everything was going to come (Testimony of George F. Plamonden.) out all right, and that in another year, we could look back and smile at our troubles, but that in no event would he be silly enough to do anything rash, make away with himself, or anything of that sort. (Testimony 104, 105.)

I am telling you the conversation, Mr. Mc-Camant, as I remember it at the moment. I did not charge my mind with it especially at the time. That is as near as I can remember it. As I tell you, I cannot remember the exact words, but that is the gist of it, that I just told you. (Testimony 105, 106.)

The last time I saw Mr. Stewart was about one o'clock in the morning of March 17, 1921. I have lived in Kelso ever since up until about the middle of April, 1921. Since that day I have been in Woodland. My home is still at Kelso. My family is there, but I had been working at Woodland, and going back and forth. So far as I know, Mr. Stewart has never returned to Kelso since the morning when he left me in the early morning of March 17, 1921. (Testimony 105, 106.)

On cross-examination, in response to interrogatories propounded by Mr. MILLER, the witness further testified: (Testimony 106.)

Mr. Stewart, I believe knew that the bank had been taken possession of by the Bank Examiner before he disappeared. Mr. Stewart has occupied a prominent position in Kelso for a number of years; I would say he had been one of the leading citizens in Kelso; and been particularly active in

(Testimony of George F. Plamonden.) promoting the welfare of the city and the interest of the public generally. (Testimony 106.) [134]

I believe that Mr. Stewart came to Kelso in 1898; and up to this time had been one of the most respected citizens of the community; he was a man almost universally trusted; he was also dealing largely in outside properties, quite a trader on side personal matters disconnected with the bank. He had a wife and little boy and had been in charge of this bank for a number of years. He knew that the bank had been closed before he disappeared; I believe that he talked to Mr. Hay over the telephone afterwards. (Testimony 107.)

This conversation that I mentioned which I had with him a few days before was after a demand had been made to pay the assessment levied against the stockholders; it was that and other things that he had in mind that made him seem rather changed; he had personally suffered a heavy loss on a farm that he owned by reason of the bad fall season of 1920. He had bought an extensive tract of land and had bought quite a lot of expensive machinery and had put in a big crop which was entirely lost by the early fall rains; his return on his crop was hardly anything and he had estimated his crop yield to be about twenty-five thousand dollars, all of which was practically lost. Beside that he owned one hundred and twenty-four shares of the capital stock of the bank and when this demand was made upon him it was necessary for him to raise between twelve and thirteen thousand dollars on the bank assessment,

On that day I noticed that he was feeling rather blue. We did not mention the assessment as such; we just had the conversation that I related to Mr. McCamant. But that was the thing I particularly had in mind. He said not to worry about it, that [135] everything would come out all right, that in a year we would be able to look back and laugh at our troubles; and I honestly do think that he thought we would at that time. I do not know that he had any idea that the bank was going into the hands of the bank examiner as an insolvent bank. He was a very optimistic fellow; and considered himself a good trader. I would not go so far as to say that he was. He gave me the impression that he believed up to the very last that the bank was all right and would pull out all right. (Testimony 108, 109, 110.)

I think he did not urge the collection of some of these loans as vigorously as he ought to have done; but times were pretty hard along about then, and it was very difficult to make collections as a matter of fact. Some of these loans had been running for a number of years, and some had not been running for so long a time. The country immediately surrounding Kelso is largely a farming community; it was formerly what would be called a mill and logging country which had gradually developed into a farming community; and at the time this affair took place, during the winter of 1920 and 1921, it was largely farming community; and there had recently been some extensive diking districts established

(Testimony of George F. Plamonden.) and the people were largely engaged in farming and cultivating those diking districts. Many people had planted oats principally and they were ruined in the September rains. As to my ideas as to the collection of these loans, I felt that Mr. Stewart should have endeavored to collect his out of town loans. I did not want him to stress the point he

should be hard on his local people, [136] but I did feel that he should make every effort to collect from these people who lived out of town and did not contribute anything to the community in which he

did business. (Testimony 110, 111.)

Under the law, we were required to keep in reserve fifteen per cent of our total deposits, that amount in cash in our bank, or cash in other banks; and we kept our reserve up pretty well. I cannot recall any time when our reserve fell much below fifteen per cent. We kept our reserve at fifteen or better trying to, all of the time. We dealt with several banks; we had money on deposit in the United States National Bank at Portland, and the National Bank of Tacoma; and the money that was in all of these banks, as well as the money which we had on hand actually in our own vaults, was sufficient to comply with the reserve demands of the law. It was some trouble to keep it up, but that trouble was more or less common to all banks during that particular time. My opinion would be that we were not the only ones having difficulty along that same line, except others might have been more than That was largely because of the financial con(Testimony of George F. Plamonden.) ditions prevailing over the country and the loss of crops over that particular section. (Testimony 111, 112, 113.)

Myself and my brother and Mr. Stewart went over the notes and other securities the bank held on the evening of, I gather from these letters, the 13th of March. I cannot recall the exact date; I give only the approximate date. I cannot remember the day of the week. It is possible that these letters may have been written the same evening after we finished our work, but I would not say that for sure. [137] My brother runs the bank at Woodland, and was doing so at that time. He may have written that letter the same night and gone back to his own bank the next morning. I would not say whether he did or not; I do not remember. (Test'y 113, 114.)

The real object of making the examination of those securities at that time, by myself and my brother, would amount to approximately to find out if we wanted to purchase the bank. There was some talk between myself and my brother concerning that; I had asked my brother to assist me; and there was also a local man at Kelso who was a very intimate friend of mine; that I had gone to, and he had offered to help. I was then contemplating that I might buy out Mr. Stewart's interest in the bank and continue the business; and it was with that in view that I was looking over these securities from the standpoint of their value to me as a purchaser. We, in buying over the bank, wanted as near as we

(Testimony of George F. Plamonden.) could, to see where we were be at in fixing the valuation of this paper. I was looking at the buyer's

viewpoint; and Mr. Stewart was looking at it from the owner's standpoint. We discussed pro and con our ideas and exchanged ideas on the particular

loans or particular notes.

I have not known of the fact that a great many of those notes that I thought were uncollectable had been worked out or will be worked out by Mr. Adams; but I am not surprised at it. I believe the indebtedness of the Lollock Transportation Company was one of the notes we figured was of no value. I would not say for sure, but that is my recollection. (Testimony 114, 115.)

The Cue note we considered worthless; I would be glad to hear that they had realized something on it. I do not know [138] how much had been collected. If there had been only a loss of fifty or sixty thousand dollars on those notes then my estimate would be too high. (Testimony 115.)

There was nothing in our examination at that time that suggested that the bank should close its doors; and we went ahead the next day, myself as well as the other officers, receiving deposits, believing that the bank was at all right. The idea of the conference at the St. Helens Hotel at Chehalis on March 6, and the reason why we were there was to work out plans for getting rid of some of this long paper that had been hanging fire. After that conference, the bank examiner decided to levy the assessment. As near as I can remember, Mr. Stewart

always kept his notes pretty well renewed; that is, to all appearances and intents, there was very little past due paper in the bank, because he kept his notes renewed, every ninety days or whenever the case might be. (Testimony 116, 117.)

I felt that it would be better for the bank and everybody concerned, if some of this paper was cleaned up; and that it would be best for the bank if some other management was put in besides Mr. Stewart. That is what we really discussed and what we started to work out, yes. We were not doing that with the idea of closing the bank. (Testimony 117.)

Mr. Stewart sent me to speak to Mr. Brown. went down to Kalama and saw Mr. Brown, and asked him if he would give us additional deposits if we would deposit warrants with him. It was a rather delicate message to deliver and I was as diplomatic as I could be under the circumstances. The idea of that particular conversation was that we wanted to get the money [139] first and then take down our warrants; which would result in our getting more deposits from the treasurer and his getting more securities; getting more than our bond provided for. My understanding and interpretation of the law was that he could not deposit more than the bond he had from the bank; but I also understood that he could take certain warrants for securities and make deposits on those warrants; that was the common practice. (Testimony 118, 119.)

But Mr. Brown absolutely refused to do that, cause, as I say, there would be an interim during which time he would have no security. At any rate, nothing came of that at all, no action was taken. (Testimony 119.)

As to the matter of presenting my resignation, I had no personal difficulties with Mr. Stewart. There were two reasons why I presented my resignation. I went into them very frankly that evening. That particular day we had had a very trying day. I had spent practically all of that afternoon working on a code wire with one of our Eastern Banks on some rediscounts. At the end of the day and after the rest of the force had left, I was mentally and physically worn out. After the Long-Bell Company had decided to come to Kelso, there were at different times some talk of the possibility of the third bank at Kelso. Mr. Stewart and I had talked those things over at various times; but Mr. Stewart would never take the matter seriously. We had two banks in Kelso then. I suggested to Mr. Stewart at one time that he go back to Kansas City and see if he would not prevail upon those people who were thinking of putting in a bank to come in with us and make one big bank out of the Kelso State Bank. But Mr. Stewart did not accept that idea very well. Later I [140] told him of my idea for a third bank in Kelso, providing there was any possible chance of new people coming in, I thought local people should establish it first. That was the day I gave Mr. Stewart my resigna-

tion. I gave him two reasons for it. The first reason which I went in to quite frankly with him was that his ideas and mine were quite at variance along banking lines; and that while my position there did not give me any authority to offer him suggestions along that line, nevertheless I felt that we were quite far apart in our ideas as to how banks should be run. We talked it over frankly. There was no personal feelings between us; Fred and I were like brothers there for five years together. I told him furthermore that I still had the idea of the third bank, I felt confident that if local people did not have a third bank in Kelso outside people would; most probably the Long-Bell people and those who were associated with them would come in and establish a bank of their own. Mr. Stewart pleaded with me to remain; he said he needed me. He said, "I will tell you what you do; if you will stay with me until after the spring clean-up," he said, "I will do my darndest to help you with your third bank if you still want to have it at that time, I will do my darndest to help you." That was just about his very words, "I will do everything I can to help you work it out," and I said, "Fred, I certainly would not jump out without sufficient notice and leave you short handed, and I most certainly will stay as long as you think you need me on the job." I said, "But," I said, "in the meantime I would like to have you consider my resignation active because I would not like to be thinking and [141] working on the proposition

of a new bank and still be in here, loyal to you." I wanted to be open and above-board about it, and I think he was well pleased with my attitude. Those were the two reasons I gave Mr. Stewart for my resignation. (Testimony 119, 120, 121.)

It was not because I thought the bank was going on the rocks, or anything of the kind. I had occasionally talked the matter over with my brother, and he saw that I was dissatisfied up there, and he advised me if I felt that way, in that frame of mind, to get out and resign. (Testimony 121.)

For several years, during the winter months, we had rediscounted more or less, as the books will show; that is the custom which country banks have; and they were doing the same in the winter of 1921. We did not deal with the Federal Reserve Bank. We were not a member of the Federal Reserve Bank, so any assistance we had would have to be from our correspondents. (Testimony 121, 122.)

On redirect examination, in answer to interrogatories propounded by Mr. McCamant, the witness further testified: (Testimony 122.)

And the main difference between Mr. Stewart and myself in our ideas as to how a bank should be run was that I thought that Fred should collect more and borrow less; his ideas as to how to keep the reserve intact was to borrow. (Testimony 122.)

Referring to the code telegram I mentioned, I cannot give you the amount of notes but anyway

we had sent a block of notes back to our New York Bank for rediscount. Mr. Stewart had made no prior arrangements for rediscounting [142] that particular block of notes as far as I can remember. He had our account with them debited with the amount so that it would show in our reserve in the meanwhile. The morning of that day we received a wire from this bank partly in code and partly not in code refusing to give us credit for the notes. Possibly Mr. Adams might have run across that telegram some place in the files. I thought at the time it was rather an odd wire to send us because it was, as I say, partly in code and partly not. It was a rather delicate matter to be sent in that particular way. Mr. Stewart asked me to reply to it in code that afternoon and see if we could not prevail upon them to take these notes. Using the A B A code which is not really made for that special purpose. I had considerable difficulty that afternoon. I worked practically all the afternoon forming a code message that would cover the ground sufficiently so that they would know what we were driving at. I finally got together what I thought would fill the bill and sent it. (Testimony 122, 123.)

Mr. Stewart frequently sent on notes and warrants and other bills receivable to some corresponding bank without having made any arrangement for their rediscount. (Testimony 123.)

In speaking of the "spring clean-up," I gathered Mr. Stewart referred to the time that county funds

would come in, our deposits would be increased, and we would be able to pay our obligations to the corresponding banks. The "spring clean-up" really came from the deposit of the tax money. (Testimony 123.)

I had not noticed until that particular day that Fred [143] looked blue and discouraged. Mr. Stewart was kept upstanding every minute. I noticed that particular day, I thought he looked pretty blue. (Testimony 123.)

I cannot recall having said to Mr. W. A. Illidge, on the day I was subpoened to come as a witness in this case, at Kelso, Washington, that Stewart had looked bad to me for two weeks prior to the time the bank closed. It is possibly true that I had noticed there was something the matter with him for two weeks before the bank closed. Mr. Stewart was this kind: Knowing him as I did, as I did know him, I really think sometimes that it is really wonderful how he did stand up under the strain he must have been under. He could not, of course, look any too well under the circumstances that he was working under at that time. (Testimony 124.)

I would say that comparatively a small part of the slow paper that we considered valueless was farm paper; most of them were other accounts than farmers; I would say that the most of it was out of town stuff, a large part of it we did not know very much about; the borrowers lived in (Testimony of George F. Plamonden.) other places. Mr. Stewart had made the loans originally. (Test'y. 124.)

I do not know whether Mr. Adams, in liquidating the Kelso State Bank, was able to collect any deposits from any other banks. (Testimony 124, 125.)

My wife heard from Mrs. Carothers a day or so ago, and they were then in San Diego, California; I would say that he had been away from Kelso about seven weeks. I think he spoke to Mr. Adams just before he left. So far as I know, he did not go away to avoid this trial. (Testimony 125.)

The examination of the assets and liabilities was made [144] at the Kelso State Bank in Kelso. Unless my brother might have had some with him, we did not have in the Kelso State Bank any of the stationery of the Woodland State Bank. (Testimony 125.)

Referring to the letters written by my brother to the Bank Commissioner under date of March 14, 1921, I noticed they are written on Woodland State Bank stationery; but I cannot recall seeing my brother after that examination was complete write any letters on Woodland State Bank stationery in Kelso. (Testimony 125, 126.)

It would seem to me, from this evidence which I now have, that that examination was completed not later than the evening of March 13, 1921; we worked pretty late, until two or three o'clock in the morning, I remember. (Testimony 126.)

Referring again to the date of this conversation between myself and Mr. Stewart, I do not recall telling Mr. Illidge the day he subpoeaned me that the nearest date I could fix the conversation was the 3d of March; I remember of telling you, Mr. McCamant, that it was about a week before the bank closed. As far as I can remember those were the very words that I used. It was right around the 10th some place. (Testimony 126, 127.)

My understanding of the amount of money that Mr. Stewart would have to raise to pay the assessment on his stock is that it would be over Ninety Thousand Dollars. (Testimony 127.)

On recross-examination, in response to interrogatories propounded by Mr. MILLER, the witness further testified:

This demand for \$90,000.00 would amount approximately [145] to a demand that we were asking him to make good on in case we purchased the bank. We could not take it over unless he did. It meant that our coming into the bank was contingent upon his being able to do that. This conversation that I referred to was after this assessment had been levied on the stock. I cannot say that I noticed any difference in his appearance afterwards than it had been before, other than this one particular time I mentioned. (Testimony 128.)

Mr. Carothers is my father-in-law; and my mother-in-law, Mrs. Carothers has been quite seriously ill; and I would say that they went to Cali-

(Testimony of George F. Plamonden.) fornia solely on account of her health; and not to avoid the trial. I do not think Mr. Carothers would try to avoid anything; he is not that kind of a man. (Testimony 128.)

(Witness excused.) [146]

## Testimony of A. L. Tucker, for Plaintiff.

Mr. A. L. TUCKER, a witness called for plaintiff, being first duly sworn, on direct examination, in response to interrogatories propounded by Mr. McCAMANT, testified as follows: (Testimony 129.)

I am now and have been for about five years, Vice-President of the United States National Bank of Portland. The United States National Bank transacted business with the Kelso State Bank during the last six months that the Kelso State Bank was open. I am familiar with the matter of the warrants described in the amended answer in this case. Those warrants were secured by the United States National Bank as pledges with us for advances that we made the Kelso State Bank. We took those warrants in on what we term a repurchase agreement. Plaintiff's Exhibit 3 is one of the repurchase agreements that we had from the Kelso State Bank. Others were substantially in the same form. (Testimony 129.)

With reference to the agreement to repurchase, when the ninety days expired, from the dates December 6th and December 8th, 1920, we had some

correspondence with the Kelso State Bank with reference to taking care of the obligations and we finally agreed to renewal if needed. (Testimony 130.)

This is a notice of the maturity of the repurchase agreement as is stated on it. That was sent out in the ordinary course of business. (Testimony 129, 130.)

The document identified by the witness was offered in evidence and marked Plaintiff's Exhibit 24. (Testimony 130.)

This letter handed me purporting to have been written by George F. Plamonden, assistant cashier Kelso State Bank, [147] dated March 7, 1921, reached our bank in the ordinary course of business. (Testimony 130.)

Letter identified by the witness was offered in evidence and marked Plaintiff's Exhibit 25. (Testimony 131.)

The witness identified a letter written by the witness to Kelso State Bank, which was offered in evidence and marked Plaintiff's Exhibit 26. (Testimony 131, 132.)

Mr. F. L. Stewart called at our bank on March 14th, with substantial cash items and took up the warrants that we were holding under the repurchase agreement, the block of \$7600.00 and a block of \$25,000.00. (Testimony 132.)

The photograph of the face and back of a draft drawn by Puget Mill Company on Pope & Talbot, San Francisco, for \$32,897,97, is a photograph of

the one of the instruments figuring in the transaction about which I have just testified. This is a copy of one of the items that he had with him on that day, one used in settlement of the repurchase agreement. That draft was turned over to us at that time, and it was used to repurchase these two blocks of warrants. The stamp of "V" on the fact of the draft, identifies the department of the bank through which it passed, which in this instance, was the notes department, which was the department of the bank in which the repurchase agreements were carried. (Testimony 132, 133.)

When Mr. Stewart came into the bank to effect this arrangement, he went to the note department (Testimony 133.)

Photographic copy of face and endorsement of draft mentioned offered in evidence and face of draft marked Plaintiff Exhibit 27–A, back of draft marked Plaintiff Exhibit 27–B. (Testimony 134.) [148]

A book was produced by counsel and the witness identified the same as a teller's cash-book; note teller's cash-book.

I find an entry with reference to this transaction in that book. From the position on the page where the entry appeared, it would appear that this transaction took place after the regular closing of the bank. In other words, the entries were made after our books were closed for the day. The record as found in the books of our bank of that transaction on that day read as follow: "The Kelso

State Bank brought incredit items totaling \$39,-397.97." (Testimony 134.)

That total is made up of an item of \$6500.00 and the \$32,000.00. The amount is not separated; it is added together and the totals appear here; and opposite the entry is a charge of \$33,491.59 which covers the repurchase agreement, the warrants. That was the liability of the Kelso State Bank on the warrants that we repurchased that day. I have read into the record all of the record there is on that subject there. When these warrants were repurchased, Mr. Stewart instructed us to place the warrants in safekeeping, in our safekeeping department, to issue a receipt for those warrants, send that receipt to the county treasurer Brown and to call him on the long distance telephone and apprise him of that fact, which we did. (Testimony 134, 135.)

We thought that we did send that receipt to the country treasurer, but we have heard since that it did not arrive in his hands. By mistake, it had been sent to the Kelso State Bank. (Testimony 135, 136.)

Counsel for plaintiffs then demanded defendant produce the original receipt given for warrants described and sent [149] to Kelso State Bank; to which demand defendants counsel replied that they were unable to find the receipt. (Testimony 136.)

Witness produced copy of receipt given at that time and identified the same; further testifying that there was attached to the original when it

left the bank, the list of the warrants concerned in this case.

Carbon copy of receipt was offered in evidence and marked Plaintiff's Exhibit 28. (Testimony 136.)

And read to the Court.

Further testifying the witness said: The signature on that instrument is the signature of Mr. W. P. Choate, the teller in that department; that receipt under my instructions. I had the conversation with Mr. Stewart. Those warrants are still in the bank except as to one or two or three of them which may have been paid; where they had been paid the bank has retained the proceeds. The bank makes no claim to those warrants, or claim of ownership; we still hold them under that receipt. The Fidelity and Deposit Company and the Maryland Casualty Company never made demand for those warrants. (Testimony 137.)

I have never seen Mr. Stewart since that day. I went over to the teller's cage when I talked with Mr. Choate; but I do not recall Mr. Stewart accompanying me across the lobby. (Testimony 137, 138.)

On cross-examination, in response to interrogatories propounded by Mr. MILLER, the witness further testified:

Through the repurchase agreement on the warrants, the Kelso State Bank became indebted to our bank in the first place in the sum of about

\$7988.00. The Kelso State [150] Bank owed us that amount, they borrowed that amount from our bank on a repurchase agreement of those warrants. I stated in our answer that they owed us on repurchase agreement because I did not want to interpret the effect of that agreement legally. The United States National Bank purchased these warrants totaling that amount under a repurchase agreement. I am not competent to say. (Testimony 138.)

The Kelso State State received from your bank \$7,988.00 in the beginning; and at a later period, it received \$26,000.00; and \$783.00, and pledged those warrants under a repurchase agreement with us. The repurchase agreement was merely a custom which our bank has in dealing with county banks; it was really a loan; and it was so understood to be a loan; we collected interest upon the money from time to time, usually monthly. We did in this case. We did not collect any interest at all on the warrant. We did collect interest upon what the banks owed us. (Testimony 139.)

The Kelso State Bank agreed to pay us the interest, and did pay us interest on this loan. That is a convenient way we have of dealing with country banks. (Testimony, 139, 140.)

It was the understanding in this instance that we should have this pledged as security for our loan, and if there was an insufficient sum realized to compensate us upon our loan we would present our claim to the bank for the balance. That is

the course we would have pursued if there was not sufficient to pay us; and the repurchase agreement was just the method we had of expressing what we really intended, that this bank had a loan, and these documents were pledged as collateral security. We entered and [151] and carried these as loans in our banking records, and reported them to the Government as loans, secured by collateral security. If we had purchased these warrants outright, they would have been deemed to be an asset of the bank, and held as assets, and would have appeared in our records in another department. In this instance however, they were recorded in our loan department, and were held as security to pay the loan. (Testimony 140, 141.)

On March 14, when Mr. Stewart brought in with him on that date, several cash account items, those items were deposited in the bank; and at that time there was also to the credit of the Kelso State Bank a sum of money, the amount of which I do not know. I have the ledger sheet here and upon looking at it, I find that on the evening of the 13th, according to the record, the Kelso State Bank was overdrawn on our books \$17,523.60. That is occasioned by a bookkeeping entry, and there were credits to go against that that had not been posted. They were posted on the following day, which gave Kelso State Bank a balance of \$15,967.99 and giving them a credit on the 14th of about \$15,000.00. Then there was deposited with the checks that Mr. Stewart brought in \$39,000.00 more. There

were several other credit items that came in during the 14th, which went into the account, there having been made several entries on that day, and the last entry would be the balance for the day. Reading these credits off, there was a remittance of \$3,362.08; there was an item of \$4.65; and there was a credit of \$39,397.97. So that altogether they had on hand at that time a total deposit of \$55,370.61, and were charged with the amount of the loan \$33,491.59, which was [152] a charge made against the entire account which the Kelso State Bank had there, and which was taken out of the bank balance. (Testimony 142, 143.)

On redirect examination, in response to interrogatories propounded by Mr. McCAMANT, the witness further testified:

If there had been a default, and we had desired to avail ourselves of what has been spoken of here as security we would have collected the warrants and applied them upon the repurchase agreement. We would not have considered it necessary to foreclose the pledge on the warrants, but we would have collected them without any other proceedings, and if the warrants were paid, we would have applied the proceeds accordingly. If they had not been paid, there are a good many contingencies to be considered; the reason for their nonpayment would depend upon what our course would be; in any event, I do not think we would have foreclosed on that security; I do not think we would have brought a suit in equity in this or any other court

for the purpose of foreclosing on that security in any event; however, that would depend on advice of counsel. It is not the custom of the bank to do that; we have never had occasion to. If we had had occasion to sell the warrants, we would not sell them without regard to the rights of the bank that had agreed to repurchase them; but if the date had expired at which the Kelso State Bank was to repurchase, and we had not granted any extension, we would have taken such legal measures as would have been necessary. Just what those would have been I cannot say. In the practice of our bank, we have never started a foreclosure suit to enforce that character of security. (Testimony 143, 144.)

When Mr. Stewart came in he had this interview with me, [153] and I placed the warrants in our safekeeping department, and instructed the teller in charge to issue a receipt. (Testimony 144, 145.) When Mr. Stewart first came in, we went to our note department; if there were any deposit slips made out, they were made out after the transaction I have described had taken place, for the mere purpose of bookkeeping. (Testimony 145.)

Plaintiff's Exhibit 27-A and 27-B was collected in the ordinary course of business, and our bank received the proceeds thereof. (Testimony 145.)

On recross-examination, in answers to interrogatories propounded by Mr. MILLER, the witness further testified:

This large check was deposited through our note

department and not along with the other checks in the deposit part of bank. The bank took the credit: and the endorsement on the back of the note, payable to the United States National Bank, is the same endorsement that would have been made on it as if that draft had been left there on deposit; the Bank of Kelso was given credit for it, and out of the balance it paid what it owed us. Mr. Stewart suggested the receipt, which I authorized, and as far as our bank was concerned, from that time on we were simply holding the warrants in custody for Mr. Stewart, or for whoever Mr. Stewart would direct. We did not have any further claim upon the warrants; and we did not have any correspondence with the county treasurer in which he agreed to take those warrants in any manner; they were merely left there in our custody and Mr. Stewart told us to send this receipt (Plaintiff's Exhibit 28.) (Testimony 146.) That is all I know about that paper; nothing further ever came up, as far as I know. We have never had any defaults in any of this kind [154] of cases, so that I would have to go and consult with Mr. Fales before I would know what to do. The deposit of this \$33,000.00 was made out by our teller; Mr. Stewart did not deposit this to the account of the bank and then draw a check. (Testimony 147.)

Q. (By Mr. MILLER.) I think we have that deposit slip here, and we would like to call his attention to it. It is made out by Mr. Stewart?

A. It was?

- Q. Yes. Just a moment, I would like a moment to find it. Mr. Tucker, isn't it possible that Mr. Stewart made out his deposit slip before he left Kelso? A. I have no remembrance of it.
- Q. I call your attention to a copy that was found by the Bank Examiner in the records. Could you know whether the original of that would be in your bank?
- A. We searched our records for it, but could not find it. They are destroyed after a certain time; we keep them one year.
- Q. Now, looking at that what would you say about it?
- A. I would say that this was the deposit that was made with the items referred to.
  - Q. And that it was made out by Mr. Stewart?
  - A. Made by the bank, Kelso State Bank.
- Mr. MILLER.—I would like to offer that in evidence?
- COURT.—Is that from the bank files,—your bank files?

Mr. MILLER.—No; Kelso State Bank's.

Mr. McCAMANT.—I object, your Honor, on the ground we haven't traced it into the United States National Bank.

Mr. MILLER.—Mr. Tucker said that the original of those were destroyed. [155]

COURT.—I don't think it is material in the case.

Mr. MILLER.—I think it may be material, because it shows they were put in in general deposit with bank.

COURT.—It don't show that was the purpose. It may have been his original purpose.

Q. I will ask Mr. Tucker more about it. Assuming that it was made out by Mr. Stewart before he left Kelso?

A. In either event, it would make no difference to us what department it went into.

Q. It went in as a deposit, in any event?

A. Yes, sir. There would be a record made by the Kelso State Bank on their own account.

COURT.—In addition to that, there would be a check checking it out, wouldn't there?

A. Yes, sir.

COURT.—You would not have to check this \$33,-000.00 if he deposited it?

A. It could be checked out through a charge slip made by the employees.

COURT.—But the Kelso bank deposited it to its own account, and then used a check to take up the warrants, there would be Stewart's check, or the Kelso Bank's, checking it out?

A. Or a debit slip to the account. We might debit the account ourselves for the amount, under his instructions.

Q. (Mr. MILLER.) You don't know how that was done in this case?

A. No, sir.

COURT.—You may put that in evidence.

Mr. McCAMANT.—I reserve an objection.

COURT.—Yes; you may have your objection [156]

174 Fidelity & Deposit Co. of Maryland et al.

(Testimony of A. L. Tucker.)

Deposit slip offered in evidence and marked Defendants' Exhibit "B." (Testimony 147, 148, 149.)

On redirect examination, witness further testified: Plaintiff's Exhibit 5, purporting to be two debit slips, one for \$7663.97, and one for \$26,069.21, are debit slips covering the retirement of these warrants by the Kelso State Bank; those debit slips were made out by our note department, and the account of Kelso State Bank was charged with those items; these deposits slips attached thereto were made out at the same time. (Testimony 149, 150.)

When Mr. Stewart came in, he stated that he had received his county funds, and was ready to retire the warrants we were holding under the repurchase agreement; he also requested us to place the warrants in safekeeping, and to telephone the county treasurer that we were holding them for his account. (Testimony 150.)

When I stated a few moments ago, that we subsequently had no interest in these warrants, and held them for Mr. Stewart or any one he might designate, perhaps that ought to be explained. Suppose the bank had continued open, and Mr. Stewart had asked us at a later date to make some other disposition of the warrants other than that called for by the receipt which we had given, we would not have honored that request until we had been relieved of issuing the receipt to the county treasurer. In other words, we would not have consented to any disposition of those warrants which

was not approved of by the county treasurer, or those who had succeeded to his interest. (Testimony 150.)

Going to the note department of our bank rather than to the deposit department, when Mr. Stewart came in, I do not [157] think that had any particular significance, except the convenience of discharging an obligation in that department. In other words, we regarded the repurchase agreement as an obligation. (Testimony 150, 151.)

On recross-examination, the witness further testified as follows:

Some of these debit slips were for interest, and some of them show when the bonds were deposited with us. Particularly referring to Plaintiff's Exhibit 5, in stating that I would not have given these warrants up because of this outstanding receipt to the treasurer, I am saying that we assumed they were deposited under his jurisdiction; we had made an agreement to hold them, and we were going to do it. If the county treasurer had demanded those warrants, we would have turned them over to him without any more authority from Mr. Stewart. But he never demanded them. (Testimony 151.)

(Witness excused.) [158]

### Testimony of L. P. Brown, for Plaintiffs.

L. P. BROWN, a witness on behalf of plaintiff, being first duly sworn, on direct examination, in response to interrogatories propounded by Mr. Mc-CAMANT, testified as follows:

I am the county treasurer of Cowlitz county,

Washington; this is my fourth year in office. (Testimony 152.) I was in office as such county treasurer of Cowlitz county in the spring of 1921; and as such treasurer carried an account with the Kelso State Bank. The agreement under which these deposits were made stated that the funds deposited in that account were county funds and depositary bonds were put up to secure the deposits. (Testimony 152.)

Certified copies of the three bonds mentioned and of the action of the County Commissioners in approving the giving of said bonds, in the amount of \$70,000.00 were offered in evidence and marked Plaintiff's Exhibit 29. (Testimony 153.)

On the failure of the bank, the surety companies who are the plaintiffs in this case, paid the amount of the deposit standing to my credit. I cannot state the amount of that deposit unless I have my records. I then assigned to the sureties the claim of the county against the Kelso State Bank. These three assignments, two running to the Fidelity & Deposit Company of Maryland, and one to the Maryland Casualty Company are the assignments I executed, and my signature appears on all of them. The amount of my deposit was \$64,492.49 on the day when the bank closed; and the assignments show that payment was made on April 25, 1921.

Assignments offered in evidence and marked Plaintiff's Exhibit 30. (Testimony 154.)

At the time I was making these deposits, I believed the [159] Kelso State Bank to be solvent,

and able to pay its obligations. If I had not thought so, I would not have given them any more deposits. If I had known on March 6, 1921, that the Banking Department of the State of Washington had held a meeting with the President and the Directors of 'he Kelso State Bank, other than Mr. F. L. Stewart, and had held that meetting at Chehalis rather than at Kelso, and had then insisted that Mr. Stewart be eliminated as an officer of the bank, and that a number of the securities carried as assets in the bank be eliminated, and that an assessment of one hundred per cent be levied on the stockholders, I would not have made any more deposits in that bank; but I did not know at any time prior to the closing of the bank that such a meeting had been held at Chehalis. (Testimony 155.)

I had a conversation with Mr. George F. Plamonden some time during the last of February or the first of March with reference to making further deposits in the Kelso State Bank. As I recall now, he came to the office and requested deposits, and the substance of our talk was that if he would put up the security he would possibly get the deposits. Examining Plaintiff's Exhibit 27, that appears to be a photograph of a draft that I deposited in the Kelso State Bank. That draft was received in payment of taxes, and it is so stated on the draft.

On March 10, 1921, I deposited in the State Bank at Kelso a check which was in payment of taxes for the amount of \$5136.41, drawn by Ida C. Oxtoby, of San Anselmo, California. I demanded a return of

the money I had deposited on the 14th of March, after the closing of the bank; I demanded the full amount of my deposit. I made that demand through the First National Bank, and the check was protested for nonpayment. (Testi-T1607 mony 156.) I did not personally have any talk with the United States National Bank, or with any official or officer thereof with reference to the warrants left there for my protection on or about March 14, 1921; nor did they communicate personally with me on the subject. They called up my deputy in my office, and told him there had been warrants deposited there; and my deputy passed that information on to me. My recollection is that was on March 14, 1921. (Testimony 156, 157.)

As far as I know the deposits made with the Kelso State Bank were made pursuant to the terms of the bonds which have been offered in evidence; and in case those bonds had not been given I would not have made the deposits. (Testimony 157.)

On cross-examination, in answer to interrogatories propounded by Mr. McCAMANT, the witness further testified:

I could not have made such deposits under the law unless I had a bond. The law required me to take a bond as security. I understood, and the bonding company understood, that according to the terms of the agreement with the Kelso State Bank, I was to get interest on these deposits, amounting to two per cent on daily balances. I did get from the bank interest on those deposits. I also received

interest on those deposits up until the day the bonding companies paid the claims, according to the terms of the bond. (Testimony 158.) The only account we carried with the Kelso State bank was a general checking account, which account has been carried there ever since I have been in office, in September, 1918; and during all of [161] that time I have had a general checking account in that bank. I never at any time made any special deposit, trust account, or anything of that character. The deposit that I made on March 10, 1921, I intended should go into the general checking account; and the same is true of the deposit made on March 14, 1921. I collected interest on the daily balances. I looked to my bond for my protection for the amount of money I had in the bank; apparently I did not pay any attention to whether the bank was solvent or insolvent. In my opinion, the bonds were good, or I would not have accepted them; because I was personally responsible for the money that went into that bank in case of any loss. I never accepted any of the warrants left on deposit with the United States National Bank as collateral security, and as far as I ever knew they were never in my custody or control, or anything of that kind; I did not even have a list of them; and I had never even seen them, except possibly some of them may have been warrants issued by our county, and I may have seen them in the first place; but I have never seen them since that time. I don't know whether I could have taken them under the law. I know I never did because I never saw the warrants or securities. I

never had any arrangement with Mr. Stewart whereby it was agreed that I should take these warrants as collateral security for the money I had on deposit in the Kelso State Bank. I never even talked to him about such a thing. Our deposits in the bank ran up larger of course during March and April and October and November. (Testimony 161, 162.)

(Witness excused.) [162]

### Testimony of Thomas E. Davis, for Plaintiffs.

THOMAS E. DAVIS, a witness on behalf of plaintiffs, being first duly sworn, in response to interrogatories propounded by Mr. McCAMANT on direct examination, testified as follows: (Test'y 179.)

I am one of the attorneys for the plaintiffs in this case. I made an examination of the records of the Kelso State Bank subsequent to the closing of the Bank on March 17, 1921. Upon that examination, I found in the files of the bank the original of the receipt given by the United States National Bank for certain warrants under date of March 14, 1921, being Plaintiffs' Exhibit 28, which is a copy which I made from the records of the bank at that time. The original receipt which I found in the records had attached to it a list of warrants; and this list is a copy of the list which we made on the adding machine at that time, from the files of the Kelso State Bank. (Test'y 179, 180.)

Copy of receipt offered in evidence and marked Plaintiff's Exhibit 31. (Testimony 180.)

(Testimony of Thomas E. Davis.)

On cross-examination, the witness further testified: I have done some work in the preparation of this case for trial. (Testimony 180.)

(Witness excused.)

The above and foregoing was all of the testimony offered by plaintiffs in their case in chief; and plaintiffs then rested. [163]

Thereupon, defendants introduced the following testimony:

### Testimony of James Wallace, for Defendants.

JAMES WALLACE, a witness for defendants, being first duly sworn, on direct examination, in response to interrogatories propounded by Mr. Miller, testified as follows: (Testimony 181.)

I live at Kelso, and I have been a resident of Kelso for seventy years; I have been there all my life; my occupation is farmer. I was a director of the Kelso State Bank for some years before it closed, but I did not have anything to do with the active management of the bank. I never at any time had any information that would lead me to believe that the bank was insolvent; I considered it was perfectly solvent up until it was closed. (Testimony 181.)

On cross-examination, in response to interrogatories propounded by Mr. McCAMANT the witness further testified:

I was present at a conference in November, 1920, for about one hour, with Mr Bennett and Mr. Minshull, at the time they were making an examination

(Testimony of James Wallace.)

of the bank. Those gentlemen did not make any complaint to me about the condition of the bank at that time. Mr. Stewart called me into the conference: the examiners never did call me. The conference simply consisted of going over the bank accounts, notes, etc. There were some notes there they criticised, but I never heard them say there were any there on which collection could not be made. I heard them criticise a lot of the paper considerably. I took no part in the management of the bank, although I was in there frequently. I never at any time made a particular examination of the assets and liabilities of the bank, although I did make some examination, a year or two years before it was closed; but during the two years which immediately preceded the closing [164] of the bank, I had made no examination of its assets. I do not know what its liabilities were at the time it closed. I know what the deposits were. I know nothing about the management of the bank; I always trusted that to Mr. Stewart. I was not invited to the meeting at Chehalis held March 6, 1921. (Testimony 183, 184.)

On redirect examination the witness further testified as follows:

None of the bank examiners ever made any complaint to me or to the other directors, except that I only know in regard to Mr. Baxter. Mr. Marsh at that time was living at Dryad, Lewis County, and was not living in Kelso at that time. (Testimony 184.)

(Witness excused.) [165]

#### Testimony of P. Baxter, for Defendants.

P. BAXTER, a witness for defendant, being first duly sworn, on direct examination, in response to interrogatories propounded by Mr. MILLER, testified as follows: (Testimony 185.)

I have lived in Kelso a little over forty years; I was a director of the Kelso State Bank for three or four years. I am a farmer by occupation. I did not know anything about the bank being in an unsafe condition on March 14, 1921, nor at any other time. No complaints were made to me by any of the bank officers, or the Bank Examiners at any time; and I never was called into any conference or consultation at any time, and I never knew anything about it. As to its financial condition, by the action of the Bank, I thought it was all right. (Testimony 185.)

On cross-examination, in response to interrogatories propounded by Mr. McCAMONT, the witness further testified:

I never made a particular examination of the assets and liabilities of the bank; I used to take their word for it a great deal; they used to tell me what it was, and I could see the papers, but I never figured them out. (Testimony 185, 186.)

(Witness excused.) [166]

## Testimony of George F. Plamonden, for Defendants.

GEO. F. PLAMONDEN, a witness for defendants, having been previously sworn, on direct examination, in response to interrogatories propounded by Mr. MILLER, testified as follows:

I presume these warrants which were in the United States National Bank were wanted for the purpose of securing additional deposits. My purpose in seeing the Treasurer about the warrants was to have him make additional deposits, and to take down additional warrants to give him additional security. I do not recall the exact date that I had that conversation with the treasurer; but it was some time early in March. At that time, the treasurer's deposits did not equal his bonds by \$40,000.00. There are five banks in the county, and the entire county funds must of necessity be taken care of by the five banks; and we were given to understand that by dividing it up equally, that each bank would get around \$150,000.00 out of the peak funds, the March funds; and Mr. Stewart was endeavoring to plan ahead on getting his full share of the deposits. That would be additional deposits and additional security to the bonds which the treasurer had. other years, we had had larger amounts. Mr. Adams could better answer as to that, because he has the records, but our balance would run higher than \$60,000.00, and higher than \$70,000,00 at times. I would not want to say how much our (Testimony of T. H. Adams.)
maximum was. The books will show. (Testimony
187, 188.)

(Witness excused.) [167]

### Testimony of T. H. Adams, for Defendants.

T. H. ADAMS, a witness for defendants, having been previously sworn, on direct examination, in response to interrogatories propounded by Mr. MILLER, testified as follows. (Testimony 189.)

The witness identified minutes of directors' meeting of Kelso State Bank of May 26, 1919, which were offered in evidence and read into the record, as follows:

May 26, 1919.

"Minutes of the meeting of the Board of Directors of the Kelso State Bank.

"Pursuant to the call for a Director's meeting the Board met in the offices of the Kelso State Bank at 3 P. M., Monday, May 26, 1919.

"Members present: President F. M. Carothers, and Vice President George L. Marsh; Director James Wallace, Cashier and Director F. L. Stewart; Assistant Cashier Geo. F. Plamondon.

"The minutes of the previous meeting were read and approved. Letters of the Bank Examiner were read, and also letters from A. L. Mills, President of the First National Bank of Portland, and E. G. Crawford, First Vice President of the United States National Bank of Portland, both complimenting the Kelso State Bank on its fine balance with them, and the fact that they were not being asked to carry any rediscounts or warrants or other items of that sort, also volunteering their assistance of any need at any time.

"The last published statement of May 12 was read and examined carefully and compared with previous statements for the past nine years. The gradual growth since 1910 was noticed and particular attention given to the fact that the statement showed a cash reserve against deposits of 32%, average for the preceding month having been 28%. [168] In addition to this notice was drawn to the fact that the bank had on hand in Liberty Bonds, and School, City, County, Road and Bridge Warrants, and U. S. Treasury Certificates, approximately \$32,000, as additional secondary reserve.

"Careful attention was given to the various loans, particularly to several oversize slow loans, including those of the Cowlitz Bridge Company, J. H. Gallagher and A. E. Johnson, and those of John L. Harris, and it was the consensus of opinion of the directors present that none of these loans would result in losses to the bank. F. L. Stewart, the Cashier of the bank, volunteered to execute a blanket guarantee covering the amount of any possible losses on any of these loans in an amount suggested by himself of not to exceed \$50,000. All of the other directors present expressed themselves as feeling that this was unnecessary but that they would be willing to accept it if he thought it best, and it was left for him to draw such a blanket

guarantee as seem to cover these matters, and to submit same to a later Directors' meeting.

"The Directors authorized loans of not to exceed \$2,000 as might be required to Geo. F. Plamondon, Assistant Cashier of the bank. Careful examination of the loans showed no other officers or directors owing the bank, with the exceptio nof one temporary loan of \$300 to Director James Wallace which was authorized by the directors.

"The general condition of the bank was carefully looked into and the fact that no rediscounts of any sort, with the exception of one Portland acceptance of \$367.65, were on the books, and that the reserve showed exceptionally high for this period of the year, and that the bank had a good strong secondary reserve heretofore mentioned in the way of bonds and [169] warrants, and that a very strong cash reserve had been carried for the past several months, was favorably commented on.

"There being no further business the meeting adjourned.

"F. M. CAROTHERS,

"President.

"GEO. L. MARSH,

"Vice-President.

"JAMES WALLACE,

"Director.

"F. L. STEWART,

"Cashier and Director.

"GEO. F. PLAMONDON,

"Assistant Cashier."

(Testimony 189, 190, 191.)

The criticism of bad paper in the bank has extended back in a general way as far back as the bank has been examined. Some of that paper we collected, some of it we traded out into other forms of security and some of it is in the bank yet. I have here the original claims presented by the bonding companies in this case; and they are the only claims which have been presented to me. (Testimony 192.)

Copies of claims attached to pleadings. (Testimony 193.)

The list of claims on which dividends have been paid, which I gave the Court, includes the claims of these two (plaintiff) companies. The claims allowed included the claim of Maryland Casualty Company for the amount set forth in their claim, upon which a payment of twenty per cent has been made, and also the claim of Fidelity & Deposit Company of Maryland, upon which a twenty per cent dividend has been paid. The witness identified cancelled dividend checks which had been issued to the corporations named, Maryland Casualty Company, and Fidelity & Deposit Company of Maryland, by the witness as Deputy Supervisor of Banking of the State of Washington. (Testimony 194.) [170]

Before paying these claims, I made up a list of the claims, and got an order of Court directing me to pay the dividends, and these are the checks by which the dividends were paid.

Checks offered in evidence and marked Defendant's Exhibit "D." (Testimony 195.)

Those checks were all paid.

On cross-examination the witness further testified:

Upon being shown certain documents, the witness testified that the signature appearing thereon was his signature and that he wrote them. The witness also identified a form of receipt referred to in the letter, and also letter from Grinstead & Laube. The instruments thus identified by the witness were then offered in evidence and marked Plaintiff's Exhibit 32. (Testimony 195, 196.)

We base our suit against the directors of the Kelso State Bank upon their neglect of their privileges and duties to properly act as directors. Asked if witness had not discovered, as a result of his investigation, that while Mr. Stewart was in charge of the Kelso State Bank there were a number of cases where bad paper would be taken out of the bank and put in safe deposit boxes of customers and good money of the customers be put in the bank instead of the bad paper, the witness testified:

Mr. Stewart was very much in the habit of making loans for his customers, and frequently a customer would in some way consent or authorize Mr. Stewart to make a loan for him, [171] or buy some paper for him—invest money in some form—whereupon Mr. Stewart would place in the customer's safe deposit box, perhaps, or in some instances

deliver to him, paper that the department of Banking was criticising. I do not believe I recall an instance of what you would call good money. He debited the account, or the man gave him a check on the bank, as a rule. I don't know whether you would call that good money or not. There is some litigation that I now have with people who charge the bank with complicity in that kind of a transaction. Involved in litigation that is in court at this time and undecided, there is some seventeen or eighteen thousand dollars. There are other claims which are based upon that same sort of a thing, but we are holding them up to see if we can get some information from the court as to how to treat them in the future. In addition to this seventeen or eighteen thousand dollars, I found from the record, as appears from my testimony yesterday, that I had that there was \$52,000.00 presented and rejected at the time of the report to the court; and some of that has been withdrawn and perhaps more filed; so it would in round numbers be \$50,000.00 including the various other claims which have not yet got into litigation. (Testimony 197, 198.)

On redirect examination the witness further testified as follows:

When a transaction of that kind was carried out, the bank did not lose anything. Mr. Stewart would take slow paper out and put money in place of it. The bank did not lose anything in that kind of a transaction. In these suits it is a question of how far the bank should be held responsible. I might

say further that these suits are not all [172] based on that one thing, but some of them are. Some of the loans that he sold out were perfectly good, were realized on, and he invariably personally guaranteed all of that paper. I do not recall a single instance where he has neglected to personally guarantee it. The checks to the Fidelity & Deposit Company in evidence were not delivered to that company as soon as the checks were delivered to the Maryland Casualty Company, for the reason that we have a bond of the Fidelity & Deposit Company of \$25,000.00 and the bonding company seemed to be very dilatory about taking care of it and while in Mr. Hanson's office one day, he or Mr. Orland, I believe Mr. Hanson remarked that they would like to see some money on this dividend account, and I suggested that they might hurry up the payment of their bond which would help me pay something. Afterwards, it occurred to me it would be a very good plan to withhold the payment of their check until they made some sort of a move on their bond for Mr. Stewart, and I held them until I was ready to sue the bonding company. (Testimony 198, 199.)

At the time I presented the claim, as I understand, our law allows us ninety days in which to present our claim after making the demand, and I had gone to Tacoma to make a formal demand upon them for the payment of the bond. During that meeting, some question was raised about this claim, and then I talked to them about delivering these dividends, but they were not at that time claiming

a preferred claim or anything of that kind. They have never made any other claims until this time. (Testimony 200.)

On recross-examination the witness further testified as follows:

I did bring an action against the Fidelity & Deposit [173] Company on the bond given for Mr. Stewart, and that action is now pending in the United States District Court for the Western District of Washington, Southern Division. (Testimony 200.)

(Witness excused.)

The above was all of the testimony introduced by defendants.

The plaintiffs then introduced the following testimony in rebuttal:

## Testimony of H. F. Hanson, for Plaintiffs (In Rebuttal).

H. F. HANSON, a witness for plaintiffs in rebuttal, being first duly sworn on direct examination, in response to direct interrogatories propounded by Mr. McCAMANT, testified as follows:

I am engaged in the general insurance business, including the issuance of surety bonds. I have represented the plaintiff companies in the settlements growing out of the failure of the Kelso State Bank. I did not personally pay the money over but I prepared the checks and sent a personal representative to make the deliveries under my instruc-

(Testimony of H. F. Hanson.)

tions I prepared the claims which have been introduced in evidence here. When those claims were presented, I had no knowledge of the circumstances under which the deposits had been made by the County Treasurer in the Kelso State Bank; nor did I have any knowledge, at that time or at any other time, prior to the payment of the claims, of there being any collateral available for those deposits. (Testimony 201.) I did not know anything about any warrants being held by the United States National Bank as security for the deposits made [174] by the County Treasurer of Cowlitz County.

On cross-examination the witness further testified:

I was connected with the company at the time these bonds were issued. The matter was not personally discussed by me with Mr. Stewart nor with the County Treasurer. The matter was handled by correspondence. We had a representative at Kelso, Mr. George F. Plamonden, who looked after the matter for me, took the applications, and submitted them, and the bonds when executed were sent to He was our agent at Kelso for the purpose of soliciting applications for bonds of all kinds. He got this business for us. The usual commission was paid to the agent; I presume it was paid by the bank. We were paid, and Mr. Geo. F. Plamonden was our agent. I did not talk to Mr. Plamonden after the bank failed, about this claim, until after payment, after our claim had been paid to the

(Testimony of H. F. Hanson.)

County Treasurer for the claim upon us. We paid the County Treasurer and talked to him after we had done so. We knew when we paid the Treasurer, and when we presented our claim, that this claim was for deposits made by the Treasurer alleged by him to have been made in this bank. We did not talk with the Treasurer as to when he had made these deposits; and did not ask him because we had certificates from him as to the amount; not when the deposits were made, but merely of the amount on deposit when the bank closed. I presume we had full opportunity of making an investigation and examining the books of the bank and finding out when they were made, but we did not attempt to. We knew when we presented our claim to the bank examiner, that the bank had failed and had been closed on the 17th of March, 1921. We presented our claim on April 25, 1921, a little over a month after [175] the bank had closed; and we knew that the bank at that time was supposed to be insolvent, when we presented our claim. I knew that the matter had grown out of deposits made by the County Treasurer in this bank. I don't remember when I talked with Mr. Plamonden about it. He happened to be in our office several months afterwards, as I recall it, and the matter came up only in casual conversation. (Testimony 204, 205.)

I did not go to Kelso or Kalama when I made this demand. I sent a man from the office to Kelso with instructions to deliver the draft to the Treasurer upon obtaining his signature to the necessary (Testimony of H. F. Hanson.)

receipts and certificates: and he was to accept the certificate of the treasurer as to the correct amount on deposit. He was not instructed to examine the treasurer's books as to the amount he had on deposit, although I suppose we had that right. I did not know any warrants were deposited as collateral for our liability, except what I have heard as a result of this case. I have only heard mention made of certain warrants; I had no knowledge of them at the time. We are general agents for these companies at Tacoma; and Mr. Rowland of our firm went to Kelso immediately after the closing of the bank for the purpose of making an investigation. That was before any claim was made upon us; he went down there not for the purpose of making an examination of the bank but for the purpose of finding out our liability. (Testimony 206.)

Mr. Plamondon is still our agent there, and he was our agent during all of this time. (Testimony 207.)

On redirect examination, the witness testified:

The authority of Mr. George F. Plamondon was merely to receive applications for bonds, and submit them to us for [176] consideration; he may have had authority to sign certain court and probate bonds, but not bonds of this character. He had no authority apart from the signing of that class of bonds; he was merely what we term a local agent; I do not believe he has any such authority from the Maryland Casualty Company. It is my recollection

196 Fidelity & Deposit Co. of Maryland et al.

(Testimony of H. F. Hanson.) that he is not the agent for the Maryland Casualty Company.

On recross-examination, the witness further testified:

It may be possible that Mr. Plamondon had authority to issue bonds in certain court matters, in matters of probate and things of that character, but when it came to the Treasurer's office, he would have to take it up with our office. (Testimony 208.)

(Witness excused.)

Whereupon the taking of testimony was concluded, and the cause submitted for judgment. [177]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E—8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a CorporaTION,

Complainants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, and the KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank.

Defendants.

### Order Certifying, Allowing and Settling Statement of Evidence.

This is to certify that the foregoing statement of evidence and proceedings in said cause is hereby allowed and settled, and that it contains all of the evidence material to the hearing of the appeal in said cause, except the original exhibits introduced in evidence at the time of the trial, being Plaintiffs' Exhibits numbered 1 to 32, inclusive, and Defendants' Exhibits "A" to "D," inclusive, which the Clerk of this Court shall certify as the original exhibits in said cause, and send the same to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, as part of the record in this cause, in lieu of copies of the same.

Dated this 17th day of Aug., A. D. 1922.

R. S. BEAN, District Judge.

Filed August 17, 1922. G. H. Marsh, Clerk. [178]

#### Plaintiffs' Exhibit No. 3.

December 6, 1920.

For and in consideration of the United States National Bank of Portland, Oregon, purchasing from the Kelso State Bank, of Kelso, Washington, the following warrants:

### 198 Fidelity & Deposit Co. of Maryland et al.

School District County of Cowlitz	\$ 4	491	74
City of Rainier	5	143	38
Road District No. 1, Cowlitz County	1	918	01
Drainage District No. 3, Clarke County	2	408	37
Diking warrants, Cowlitz County	11	916	47

\$25 877 97

The Kelso State Bank hereby agrees to repurchase the said warrants at par on or before ninety days after date, and further agrees that interest at the rate of 7 per cent per annum is to be charged monthly to the account of the Kelso State Bank for the time carried by the United States National Bank of Portland.

[Seal Kelso State Bank]

KELSO STATE BANK,
By GEO. F. PLAMONDON,
Assistant Cashier.

Filed March 30, 1922. G. H. Marsh, Clerk. [179]

#### Plaintiffs' Exhibit No. 4.

THE UNITED STATES NATIONAL BANK.

Portland, Oregon, December 8, 1920.

For value received, the Kelso State Bank, of Kelso, Washington, hereby sells to the United States National Bank of Portland, Oregon, the following warrants:

Cowlitz County Diking Warrants ..... \$ 6 853 12 Cowlitz County Diking Warrants dis.

#36 ...... 1 135 00

The Kelso State Bank hereby agrees to repurchase these warrants on or before ninety days, and further agrees that interest at the rate of 7% per annum is to be charged monthly to the account of the Kelso State Bank.

> KELSO STATE BANK, F. C. STEWART,

Cashier.

Filed March 30, 1922. G. H. Marsh, Clerk. [180]

#### Plaintiffs' Exhibit No. 5.

KELSO STATE BANK, Kelso, Washington.

3-14-21.

We today DEBIT your account as follows:

Your re-purchase Agreement #36881due 3/8–21 ...... 7 613 62

Interest from 2/8/21 to 3/14 ...... 50 32

7 663 94

UNITED STATES NATIONAL THE BANK OF PORTLAND, OREGON.

D. O., Accountant.

#### DUPLICATE.

UNITED STATES NATIONAL BANK. Portland, Ore., March 14, 1921.

Kelso State Bank,

Kelso, Washington.

We credit your account as follows:

Number or Date of Letter

Repurchase Agreement. date 3/6 ...... 25 877 97

Amount

where than in Portland, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, whether the collecting agent be the person or concern on which the check for collection is drawn or not, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account.

Checks drawn upon this bank will be credited conditionally and if found not good at close of day's business, will be charged back to depositor's account. In making this deposit the depositor hereby assents to the foregoing conditions.

Form 270.

# DUPLICATE. ORIGINAL

### UNITED STATES NATIONAL BANK.

Portland, Ore., March 14, 1921.

Kelso State Bank.

We credit your account as follows:

Number or Date of Letter

Amount

Repurchase Agreement.

Date 3/8/21 ..... 7 713 62

where than in Portland, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, whether the collecting agent be the person or concern on which the check for collection is drawn or not, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession.

Under these conditions items previously credited may be charged back to the depositor's account.

Checks drawn upon this bank will be credited conditionally and if found not good at close of day's business, will be charged back to depositor's account. In making this deposit the depositor hereby assents to the foregoing conditions.

Form 270.

Form 354 88944

Kelso State Bank.

March 14, 1921.

Kelso, Washington.

We today DEBIT your account as follows:

Your re-purchase #36598 due 3/8 .... 25 877 97 Interest to March 14, 1921 ..... 191 24

26 067 21

# THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON.

D. O., Accountant.

BANKS.

3-14-21.

Kelso State Bank, Kelso, Washington.

We today DEBIT your account as follows:

Re-purchase Agreement #36598 due 3/6 25 877 97
'' '36881 '' 7 613 62

33 491 59

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON.

D. O.,

Accountant.

Filed March 30, 1922. G. H. Marsh, Clerk. [181]

1921
Treasurer,
County
Brown,
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Feb. 23	Feb. 24 238	Feb. 25 62	Feb. 26 40	Feb. 28 3 49 4 85	Mar. 1 7	Mar. 2	Mar. 3 125	Mar. 5 7 50 15	Mar. 8	Mar. 9	Mar. 11 14	Mar. 14 33	30, 1922. G. H. Marsh,
Feb. 23	Feb. 24 238	Feb. 25 62	Feb. 26 40	Feb. 28 3 49 4 85	Mar. 1 7	Mar. 2	Mar. 3 125	Mar. 5 7 50 15	71 Mar. 8	44 Mar. 9	Mar. 11 14	Mar. 14 33	30, 1922. G. H. Marsh,
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Feb. 23	<b>24</b> 238	Feb. 25 62	Feb. 26 40	Feb. 28 3 49 4 85	Mar. 1 7	Mar. 2	Mar. 3 125	Mar. 5 7 50 15	21 910 71 Mar. 8	22 598 44 Mar. 9	Mar. 11 14	Mar. 14 33	1922. G. H. Marsh,

## Deposited with

Plaintiffs' Exhibit No. 7.

THE KELSO STATE BANK, KELSO,

WASHINGTON,

For the credit of

Kalama, Washington, March 10, 1921. L. P. Brown, Treasurer of Cowlitz County,

Amount. Myself unless otherwise noted To Whom Payable. Mrs. Fred Gackstatter Bank Drawn Upon. By Whom Issued. Yourselves unless otherwise noted,

64 00 238 21 6 Mrs. L. S. Dennison Masonic Lodge #94 Eula Clark Newell W. A. Dickenson Katherine L. Vigel Lucia Jenkins Adams & Co. John Gunnari E. D. Ayers Riley Oyster H. E. Hett

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\$6572 55

						vs.	K	elso	S	tate	e B	3an	k e	et a	<i>l</i> .		
Amount.	90 8	160 28	148 58	41 92	31 06	14 37	21 65	11 45	20 45	18 65	10 25	54 20	12 05	15 05	10 25	5136 41	
To Whom Payable.	Myself unless	otherwise noted.					Geo. F. Plamondon	R. A. Davis Co. Auditor	R. A. Davis Auditor	R. A. Davis	R. A. Davis, Auditor	Co. Auditor	R. A. Davis Co. Auditor	R. A. Davis	County Auditor		
Upon. By Whom Issued.	F. M. Carothers	do	Beiger Veneer Co.	Joseph A. Schaffer	C. R. Button	Cashier's check	F. L. Stewart	C. W. Simmons	Mrs. B. M. Atkins	J. W. Beiger	Chas. A. Peters	do	G. J. Poysky	Joseph A. Schaffer	Amelia Anderson	11-21 Ida C. Oxtoby	
Bank Drawn Upon	Yourselves unless	otherwise noted.														San Francisco 11–21	

Copy—Deposit slip Kelso State Bank, Kelso, Washington, March 10, 1921. Filed March 30, 1922. G. H. Marsh. [183]

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22 39 64

# THE KELSO STATE BANK, KELSO, WASHINGTON,

Plaintiffs' Exhibit No. 8.

Deposited with

For the credit of

L. P. Brown, Treasurer of Cowlitz County,

Kalama, Washington, March 14, 1921.

To Whom Payable. By Whom Issued,

Myself unless otherwise noted John Gunnari Eva Talbot Bank Drawn Upon. Yourselves unless

C. A. Pauley F. E. Day F. Oswald Al Secor otherwise noted.

Geo. W. Shult Oliver Byerly

Harry Jaques

G. A. Poland

Isaac Martin Geo. Smith

H. Meier

29 38 39

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A W Filestwood

	vs.	Kelso	State	Bank	et a	<i>!</i> .	207
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		Auditor,					32
		R. A. Davis, County Auditor, R. A. Davis					
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do Geo. Foster Mrs. M. A. McKinnon	Joseph Somatis R. H. Carlon	G. E. Johnson Chas A. Peters	E. J. Master do	Coweeman Driving & Rafting Co.	do Clark Creek Log Co.	Vogue Amusement Co. C. W. McFarland	Puget Mill Co.
						Pone & Talhot	San Francisco

Yourselves unless otherwise noted.

Copy—Deposit slip Kelso State Bank, Kelso, Washington, March 14, 1921. Filed March 30, 1922. G. H. Marsh, Clerk. [184]

## Plaintiffs' Exhibit No. 9.

December 15, 1919.

Mr. F. L. Stewart, Cashier, Kelso State Bank, Kelso, Washington.

Dear Sir:

The examination made of the affairs of your bank at the close of the business November 19th by Mr. Claude P. Hay did not show the improvement in your condition expected.

The abuse of your cash item account cannot be too severely criticised. Overdraft checks and items representing insurance premiums remitted for, but not collected are entirely improper in this account. You have been in the banking business long enough to fully understand why such is the case. In reporting such items to this office in your call reports constitutes making a false statement for which you could be prosecuted.

In answer to a letter of inquiry the United States National Bank of Portland reports to us that it holds \$21 600 00 in liberty bonds under a re-purchase agreement executed by this bank. By your failure to carry these bonds on your books and report them as re-discounted with the U. S. National Bank you have violated the law. In the past you have been guilty of this same violation of law and each time the matter was called to your attention. Will you furnish me with some reasonable excuse of why you should not be prosecuted for your fail-

ure to show the liability of your bank under this repurchase agreement.

On March 18, 1920, you have carried the property described as "120 acres Josephine County, Oregon, book value \$3 563 36" in your other real estate account for the five year period allowed by law. On that date you will charge this property off your books if you have not disposed of it in the meantime. [185]

This office has been exceedingly lenient with you in the past permitting you to carry a number of objectionable loans on your promise that they would be collected if you were given a reasonable time. At the last examination made of your bank you assured the Examiner that you were placing a bond issue upon certain timber lands owned by you in the amount of approximately \$50 000 00. According to your statement at that time arrangements were practically completed for the issue and sale of these bonds and it was understood that you were to use the proceeds to eliminate loans carried by your bank to which objections have been made for the last several years by this office. Sufficient time has expired for this program to have been carried out but nothing seems to have been done. Our patience with you has now reached its limit and we propose that the affairs of your bank be adjusted in accordance with the recommendations of this department. You are therefore instructed to collect the following loans on or before March 15, 1920:

Corvallis Sand & Gravel Co	\$7 650 00
J. W. Alexander	4 460 00
Cowlitz Bridge Co	10 000 00
J. H. Gallagher	6 000 00
M. E. Cue overdraft	395 31
M. E. Cue	4 500 00
Hub Printing Co	9 000 00
John L. Harris	3 000 00
John L. Harris	7 800 00
Independent Navigation Co	7 500 00
A. E. Johnson	4 000 00
Max Johnsen	16 564 50
N. W. Transportation Co	15 000 00
W. T. Slattery et al	1 622 50
A. J. Wallace	4 197 39
A. J. Moser	4 197 39
Triumph Machinery Co	500 00

You are also instructed to discontinue making any loans to these parties in the future.

In addition to the items listed under schedule "A" on sheet 11 you will charge off immediately the acceptances drawn [186] by the Triumph Machinery Company amounting to \$1,729.47, all of which are past due at the time of the examination and discontinue purchasing any more acceptances of that company.

You will report full compliance with the above instructions to this office on or before March 20, 1920. Your failure to report such compliance will result in the necessary action being taken by this department to place the affairs of your bank in proper condition.

In going over correspondence had with you in the past after examinations made of your bank I find that you have practically ignored the instructions of this department. On February 7, 1919, a letter was addressed to you requiring that certain adjustments be made and instructing you to submit that letter to your board of directors and for them to reply over their own signatures to this department by May 1st that they had read the letter. and also have them report in detail the proper adjustments of each item mentioned. We received from you a copy of the minutes of the meeting of the board of directors of your bank on May 26th signed by the individual members of your board. These minutes merely mentioned that a letter of the Bank Examiner was read and go on to compliment the management of your bank and the condition of your bank in no uncertain terms. This document did in no way comply with my request. You are now instructed to present this letter to your board of directors and have them acknowledge to me over their own signatures that they have read it.

Yours very truly,

Bank Commissioner.

LHM:HS.

Filed March 30, 1922. G. H. Marsh, Clerk. [187]

### Plaintiffs' Exhibit No. 10.

Examiner's Summary of Condition—Continued. General Remarks:

Examiner should give a complete summary of all matters to which special attention be called, giving each subject a separate paragraph. This summary should include any matters referred to under head of Miscellaneous Information, to which attention should be called.

Reserved 17.7 O. K.

#### LOANS.

As per list below, the following loans	are con-
sidered very slow, and in many cases very	doubtful.
Corvallis Sand & Gravel Co	\$ 7,500.00
John W. Alexander	4,110.00
Robt. Bowman	1,500.00
M. E. Cue	6,250.00
Hub Printing Co	10,000.00
D. B. Carr	763.00
John L. Harris	9,600.00
Amelia M. Hull	216.00
W. F. Holton	250.00
Max Johnson	10,689.50
A. E. Johnson	4,000.00
Fritz Kruse	5,000.00
Mark Lane	177.25
A. J. Moser	4,368.00
Triumph Mach. Co	1,850.00
H. F. Morse	1,074.50
Morse, R. E	1,000.00
N. W. Transportation Company	4,500.00

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vs. Ke	elso $S$	tate .	Bank	et	al.
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Peters Garage & Machinery	7,500.00
Secor Brothers	7,845.00
L. Stock	250.00
Frank Shepard	9,589.40
W. C. Slattery	3,370.50
J. H. Gallagher	6,000.00
A. G. Wallace	4,368.00
Lula B. Wells	2,270.00

In other words, \$114,041.15 of this Bank's loans (total loans \$362,406.41) are subject to very severe criticism. Examiner does not feel that it is necessarv to take up each loan on sheet ten and supply additional information, as the loans are fairly well covered on sheet six. In connection with these loans, will say however that a large per cent of the ones listed above have been in this bank for a large number of years, and all that this bank is doing to collect is to renew, AND ADD THE INTEREST IN, each year. On several of these loans, examiner would say that no real money has been received (if so it was borrowed from this bank) on these loans since they were made. While no doubt in some cases the notes are in better shape than at last examination, [188] on the other hand some of the most doubtful ones have been materially increased. Attention is called to the examination just previous to this one, and also to the correspondence on file (same is returned herewith) by referring to a letter from this department dated December 15, 1919, we find that at that time the department felt that it was time to collect some of these loans that had been running since the bank

started (so to speak) and Stewart was instructed to collect, AND to discontinue making loans to these parties. From all information examiner was able to obtain it seems as if instructions from this department are a mere detail, and that Stewart does as he pleases. He controls the bank from President on down, and the directors of this bank are mere figure heads. Examiner requested that the Directors be called in, at a meeting to be held at one thirty on Saturday, (examiner notified the Deputy Bank Commissioner, and he came down) but two of the directors were out of town, one director only showed up at the meeting besides Mr. Stewart. Examiner noticed that Stewart seemed very anxious to avoid having the other directors there, and seemed to be glad to get rid of the Examiners and Deputy Commissioner.

Cashier dominates the board of directors, and makes all the loans for this bank himself. Examiner frankly believes him to be crooked, although all accounts seem to balance except the loans which are \$111.00 off. Examiner would have demanded the cashier's resignation but for the fact that it would be a very serious thing to do at these critical times. No doubt a forced resignation would cause a run on the bank, and frankly, this bank can't stand a run now. While this bank might be able to liquidate in the course of human events, it could not do so very fast with \$114,000.00 of doubtful and slow paper.

Examiner feels that Cashier has in the past, if not at present, been given valuable consideration for making [189] these loans, and for extending them as he has done. Attention is called to the numerous renewals of old stuff where the due date is in the far distant. Cashier seems very well pleased with himself in fact better pleased with himself than examiners were of him. He seems to be kidding himself along and trying make believe that some of these loans are all O. K. and that all he has to do is to renew them when they get a little stale, add the interest in, and consider it a new loan. Examiners feel that a loss equal to at least the amount of the Surplus & Undivided Profits will be the result of these loans.

Examiners called the Deputy Commissioner down to see for himself the lay of the ground, and also to have its effect on the Cashier, because the time has come to call Stewart's hand and see who has the best cards. Personally Examiners feel that the guarantee executed by Stewart is not worth anything, as it would be as hard for him to dig up \$50,000 at this time as it would a lot of other people who claim to have less. Note also that the guarantee covers the notes in the Bank at the time the guarantee was given, but of course does not cover the renewals. This may be one of the large reasons why so much of this old doubtful paper has been renewed.

Loans listed on sheets

5 & 6 .....\$276,163.86

Loans not listed ....... 86,242.55 \$362,406.41 Examiner did not put very much under "B" or "C" nor all that should perhaps go under "A."

Nor was sheet twelve filled as it should be, due to the fact that Deputy Commissioner said that that would be handled from the office. In this connection will say that there is ABSOLUTELY NO USE IN TELLING STEWART ANYTHING UN-LESS NECESSARY FORCE IS USED IN BACK-ING IT UP. Note that in the correspondence he has been warned from time to time, and threatened as to taking charge of his bank by this department but to no avail, he handles it as he wants to. and the rest can [190] be D—— for all he cares. Examiner would not like to have department tell Stewart a thing unless it will go the limit in forcing compliance with it, and at once too. Stewart thinks that Mr. Hav is (or at least says Mr. Hay is) very well pleased with the progress that this bank is making in cleaning up this old stuff. Examiner would just give most anything to have had Mr. Hay on the job and pointed out the weak spots in this man's line of chatter, (it would have taken all the time though) but examiner knows that Stewart is stalling, and that Mr. Hay (if he were there) would know that Stewart is one that will bear watching, and that he has paid no attention to law, Department rulings, good business sense, and everything that goes to make a clean, A-class Bank.

Other than the immense list of cash items, the detail work seemed up in fair shape. Mr. Knapp says that he has no particular criticism, other than sheet twelve, on the way the detail is handled.

This bank's force sure try to treat you right and make a favorable impression but the cashier slipped a little when he stated that it was largely through his efforts that Mr. Hay was appointed Commissioner. This line of chatter don't go with this examiner, we looked them over rather carefully after that.

Anything not covered here can be referred to the Deputy Commissioner, or if necessary will be glad to supply any additional information if I have it.

H. S. BENNETT,

Examiner.

Filed March 30, 1922. G. H. Marsh, Clerk. [191]

#### Plaintiffs' Exhibit No. 11.

COPY.

February 1, 1921.

Mr. F. L. Stewart, Cashier, Kelso State Bank, Kelso, Washington.

Dear Sir:

In looking over the letter to you written by Mr. Minshull on December 13, 1920, relative to the criticisms of your bank by the Examiner following his inspection of November 18, 1920, it would appear to be of advantage to us at this time for you to send us a detailed statement of the action taken by you in regard to each specific requirement contained therein. You will also send us a copy of your daily statement as of January 31, 1921.

#### 218 Fidelity & Deposit Co. of Maryland et al.

Please do not delay giving us this information, as we do not want to incur the expense of sending an Examiner to obtain it if we can avoid doing so.

This office will expect you to make every effort to place your institution in proper condition at an early date, and we wish to impress upon your mind that further delay will not tolerated.

> Yours respectfully, CLAUDE P. HAY, Bank Commissioner.

By ———,

Special Deputy Bank Commissioner.

ETW: HS.

Filed March 30, 1922. G. H. Marsh, Clerk. [192]

#### Plaintiffs' Exhibit No. 12.

March 7, 1921.

Personal.

Mr. F. M. Carothers, President,

Kelso State Bank,

Kelso, Washington.

Dear Sir:

At a conference with Mr. Stewart last evening, we endeavored to impress upon him the desirability of his withdrawing as the managing officer of your bank. He left us with the understanding that he was to work out a plan whereby he would relieve himself of the cashiership. His resignation has not as yet been demanded. We felt that perhaps results could be more easily arrived at to allow him

to suggest a plan that would meet with our approval.

I am writing him today as per the enclosed copy of letter which is self explanatory, and which will inform you and the rest of your Directors of the position which we have taken.

## Yours very truly, DEPUTY BANK COMMISSIONER.

JCM/m.

Enc.

Filed March 30, 1922. G. H. Marsh, Clerk. [193]

#### Plaintiffs' Exhibit No. 13.

March 7, 1921.

Mr. F. M. Carothers, President, Kelso State Bank, Kelso, Washington.

Dear Sir:

Enclosed herewith find notice for the levying of an assessment of 100% against the capital stock of your bank, which assessment is made in accordance with the agreement had at the conference held in Chehalis between yourself, Mr. George L. Marsh, Mr. Claude P. Hay, Bank Commissioner, and myself, and which was followed by a conference between Mr. Hay, Mr. Fred L. Stewart and myself.

When this assessment is collected you will notify this office at which time a representative from this department will meet with your Board and determine the particular items to be eliminated. As stated yesterday it is very much to be desired that this assessment be collected as quickly as possible, and without any publicity whatever being given to it. For this reason we believe it advisable that you determine among yourselves which Director should personally see the other stockholders and have the matter presented in such a manner that no embarrassing situations will result. The more quickly and quietly that this can be done the less liability there will be of any injury resulting to your bank.

You are instructed that we shall look to you personally to see that the meeting of your Board of Directors is called and that the necessary steps for the collection of this assessment are taken.

Kindly have your Directors acknowledge receipt of the notice of the assessment over their signatures.

Yours very truly,
DEPUTY BANK COMMISSIONER,

REGISTERED.

JCM/m.

Enc.

Filed March 30, 1922. G. H. Marsh, Clerk. [194]

#### Plaintiffs' Exhibit No. 14.

March 7, 1921.

Mr. Fred L. Stewart, Cashier,

Kelso State Bank,

Kelso, Washington.

Dear Sir:

We have to-day given your president, Mr. F. M.

Carothers, formal notice of the necessity for levying an assessment of 100% upon the capital stock of your bank and have instructed him to call a meeting of your Board of Directors and arrange for the collection of same. When this is accomplished, this department is to be notified and a representative from this office will meet with your Board and determine just what assets shall be removed.

As stated to you last night, we have determined that the greatest good to yourself and your bank can be accomplished by some plan which will relieve you of the responsibility of the load which you have been assuming. We will, therefore, ask that you make some definite arrangements whereby the active management of your bank will be placed in the hands of some person other than yourself. Any plan which you submit must meet with the wishes of your board of directors before it would be approved by this Department.

Yours very truly,

DEPUTY BANK COMMISSIONER,

JCM-M.

Filed March 30, 1922. G. H. Marsh, Clerk. [195]

Plaintiffs' Exhibit No. 15. STATE OF WASHINGTON,

Banking Department.

Olympia, March 7, 1921.

To the Directors of Kelso State Bank, Kelso, Washington.

NOTICE.

You are hereby notified that in order to remove

from your assets certain objectionable items, this department finds it necessary to require you to levy an assessment of One Hundred Per Cent (100%) against the capital stock of your bank.

You are, therefore, instructed to call a meeting of your Board of Directors within ten (10) days from the date of this notice, at which meeting you will adopt a resolution for the levying and collection of said assessment; you will immediately serve notice upon each of your stockholders, personally, or by mail at their last known address, to pay such assessment into your bank.

This notice is given you under the provisions of Section 34, Chapter 89 of the Laws of 1917 of the State of Washington.

#### DEPUTY BANK COMMISSIONER.

Filed March 30, 1922. G. H. Marsh, Clerk. [196]

#### Plaintiffs' Exhibit No. 16.

COPY:

October 13, 1921.

Honorable Eliot Wadsworth,
Assistant Secretary of the Treasury,
Washington, D. C.

Dear Sir:

In reply to your letter of the 23d ult., I beg to advise you that 50% of the loss sustained through the failure of this bank would in my judgment be a fair guess at the value of the salvage. The sum mentioned by you of \$3,693.01 would not be in

excess of 10% of the loss sustained by the Fidelity & Deposit Company of Baltimore, however.

We are involved in so much litigation and other uncertainties that no accurate estimate of the value of salvage can be made. Nothing better than a guess can be offered.

Sincerely, T. H. ADAMS,

Special Deputy Supervisor of Banking, Liquidating Kelso State Bank.

Filed March 30, 1922. G. H. Marsh, Clerk. [197]

## Plaintiffs' Exhibit No. 17. COPY.

#### GUARANTEE.

Kelso, Washington, May 26, 1919.

I hereby guarantee the notes and mortgages held by the Kelso State Bank, both as to principal and interest, up to a sum not to exceed \$50,000.00, according to my proposition made to the Directors of Kelso State Bank at its meeting held in the offices of the Bank on May 26, 1919; this being done for the reason that these notes and mortgages have largely been accepted by the bank on my personal judgment in collecting in and making good old loans carried in former years; it being my judgment that these loans can all be collected in full, with principal and interest, by taking more time.

Signed and dated at Kelso, Washington, this 26th day of May, 1919.

(Signed) F. L. STEWART.

224 Fidelity & Deposit Co. of Maryland et al.

Filed March 30, 1922. G. H. Marsh, Clerk. [198]

#### Plaintiffs' Exhibit No. 18.

December 13, 1920.

Mr. F. L. Stewart, Cashier, Kelso State Bank, Kelso, Washington.

Dear Sir:

Since the examination of your bank was made by examiners Bennett and Knapp on November 18th, my time has been so completely occupied that I have been unable to give the same proper attention.

In going into the matter more thoroughly than I had an opportunity to do when in your bank I am more than ever convinced that it is absolutely essential that a radical departure from past methods employed in your bank must be made.

When it is considered that you were carrying more than 50 separate items as cash, which could not be considered as such, some of which had been running for more than six months, it is needless to say that the conclusion must follow that there has either been a willful attempt to mislead this department in regard to your proper reserve, or that the persons responsible for this practice are lacking in the knowledge of what is proper conduct for a bank officer. The practice is all the more deplorable in view of the fact that your attention has been called to this in the past.

There are so many items in your loans, the value of which is either very questionable or upon which the information is so inadequate that we cannot intelligently pass upon same, that we believe it is imperative that we issue the following instructions:

#### Corvallis Sand & Gravel Co. \$7,500.00.

You will collect this item at the rate of not less than \$200.00 per month. Should more than [199] three months delinquency in payments occur at any time, you will immediately start suit to recover or charge off the full amount yet unpaid.

John W. Alexander \$3,110.00. W. C. Slattery \$3,370.50.

These obligations have been almost doubled since the last examination, although at that time you were instructed to collect same. On the information furnished the examiners the proceeds of these loans have been used for purely speculative purposes. You are instructed that you will collect all of this total obligation within 90 days. Northwestern Transportation Co. \$4,500.00. Frank

Shepard \$9,589.40.

Your loan to the transportation company was criticised December 15, 1919, and you were instructed to collect same. Your total loan now constitutes excess and you will at once charge off that portion in excess of 20 per cent of your combined capital and surplus. The balance must be col-

lected in full during 1921. Your failure to do so will result in an order to charge off the entire amount.

Max Johnson \$10,689.00.

This department has always strenuously objected to your loans to this party. You now admit a loss of \$6,000.00 which you were ordered to charge off. The balance you will collect or charge off within 90 days.

A. J. Moser.....\$4,368.00

A. G. Wallace..... 4,368.00

Triumph Machinery Co. .... 1,850.00

The total amount of this loan being an excess you will charge off the excess portion immediately. The balance must be substantially reduced at once. This loan has been consistently increased over a period of three years in spite of the protest of this department.

Secor Brothers \$7,845.00.

This loan shows a net increase of \$435.00 over the last three years. This must be reduced immediately.

A. E. Johnson ......\$4,000.00

J. H. Gallagher ..... 6,000.00

#### [200]

Although the financial statements of this company submitted to this department by your bank since 1918 show a continued improvement, you have failed to reduce this within the past year. It must be considered in the nature of a capital loan and its reduction is therefore ordered.

You will collect the following within 90 days:
Robert Bowman\$1,500.00
Castle Rock Logging Co 1,533.04
J. B. Ford
Mark Lane 177.25
L. Stock 250.00
Lulu B. Wells, et vir 2,270.00
Clark Studebaker 2,958.50
The following you will charge off at once if not
lready collected:
D. B. Carr\$ 763.00
Amelia M. Hull
W. F. Holton 250.00
Arthur Lee

\$2,563.80

You will secure and forward to this office statements supporting the following:

H. F. Morse item..... 1.309.00

Peters Mchy. and Garage.

F. Kruse.

al

Northwestern Transportation Co.

Frank Shepard.

Thompson-Ford Lumber Co.

Clark Studebaker.

J. L. Harris.

You will collect or charge off within 90 days all items due you from the Thompson Ford Lumber Company represented by the assigned invoices, and in the future you will immediately charge off any item of this nature outstanding more than 90 days.

Your total loan of \$12,650.00 to Thompson-Ford

Lumber Co., J. R. Ford, J. R. Thompson and their wives is an excess loan and you will immediately charge off the excess portion.

M. E. Cue, \$6,250.00. Hub Printing Co., \$10,000.00

This is an excess loan, and has been so classified before by this department. You, however, have seen fit to consistently increase [201] this over a period of three years. You will therefore immediately charge off \$6,250.00 of this amount.

Schedule A of Sheet 11, a copy of which was left with you by the examiners, shows a total of items to be charged off of \$11,736.02. Of this amount you stated \$6,000.00 would be assumed by yourself, thus leaving \$5,736.02 to be deducted from your undivided profits and surplus. In addition there is represented in the above letter items to be charged off of \$16,409.20. This will eliminate most of your surplus and will, therefore, reduce your loan limit.

You are instructed that it will be improper for you to pay any dividends until permission has been given by this department.

It will not be satisfactory for you to accept renewals in lieu of payment of any of the above items, and we cannot allow you to substitute notes therefor. The collections must actually be made.

The above instructions have been given only after the most careful consideration of the report of examination and of the events which occurred during the time the writer was in your bank at the time of the examination. I recall your statements with respect to many of the items listed above and believe that you feel that some of them are too severely criticised. I am frank to say, however, that I am convinced you are misleading yourself, and that before the entire matter is cleaned up your bank will have suffered a severe loss. You will consider the above instructions as definite. You will report to this department not later than December 31, 1920, showing what progress you have made toward complying with these instructions.

You will report again not later than March 15, 1921. Your failure to show proper progress can only result in a special [202] examination being made of your bank in order that we may determine what will be the proper course to pursue toward eliminating the objectionable items.

Please acknowledge receipt of this letter.

Yours very truly,

#### DEPUTY BANK COMMISSIONER.

J. C. M./HS

Filed March 30, 1922. G. H. Marsh, Clerk. [203]

#### Plaintiffs' Exhibit No. 19.

(Copy.)

#### WOODLAND STATE BANK,

Woodland, Wash., March 14, 1921.

Mr. Claude P. Hay,

Bank Commissioner,

Olympia, Washington.

Dear Mr. Hay:

I am enclosing herewith copy of my report on the paper held by Kelso State Bank, copies of which

have been sent to Mr. Stewart, Mr. Carothers and Geo. F. Plamondon. Of course, the opinions shown are not infallible, but I have tried to be conservative as I would in my own business. Mr. Stewart objected strenuously to some of the values arrived at, but I assume he should do so to justify his having the paper in his case.

Nearly all of the paper in his cases can be classified as petrified assets, very little liquid, and the larger part valueless. I cannot see how it can ever be worked out as matters now stand, unless Mr. Stewart is able to pay a large part of his liability in cash and thus reduce the loans to a point justified by the deposits. I calculate Mr. Stewart's liability as follows:

Notes to bank as maker and endorser....\$20,352.40 Amount necessary to redeem stock now

held by First National of Portland as

collateral	14,000.00
100% assessment on 124 2/3 shares	12,466.67
Special guarantee on notes	50,000.00

\$90,819.07

It will be absolutely out of the question in my mind for the reorganizers to take that much of Stewart's paper even though it be fully secured, for we shall find ourselves in the same condition as the bank now is, as to reserves, in a very short time, and therefore stiff pressure must be brought to bear on Stewart to get some money and at least reduce his liability to [204] \$50,000.00 of well secured stuff. Should Stewart be able to do

this, then I believe the bank will be solvent, though yet petrified to a somewhat lesser extent (sort of a semi-petrification, may I say) but in a condition that can in the course of a year or two be worked out without loss to depositors or shareholders. At the present time I do not see anything to sell.

Stewart has \$86,000.00 of life insurance policies. There must be a substantial cash surrender value there. He has a large equity in the Alger Timber proposition that should yield something in an early return. Numerous and sundry other properties are owned by him and with his assistance could probably be converted into cash in a reasonable time. His present plan is to go to California and remain permanently at an early date. I think this is a mistake as no one but him can work out the largest part of this mess, and he should be compelled to do it, and, I believe, will willingly do so.

His patrimony will be available some of these times, and it looks to me that he should be required to furnish security with his father and mother for the amount necessary to put the bank in solvent condition. He will dislike to do this, I know, but on the other hand 1,000 depositors will dislike to suffer a loss, and as things now look, there will be a very substantial loss in event no reorganization takes place.

I did not look personally into the contingent liability of the bank for notes and bills sold, said to be sold without recourse but with Stewart's personal endorsement. This matter is vital and should have careful attention. I believe further that Stewart

should be compelled to sign an affidavit setting forth that the signatures on the notes and bills held by the bank are genuine, that the paper has been given for value received, and that there are no legal offsets or claims against the stuff. This will tend to [205] straighten out at least one matter of doubtful legitimacy.

In event Stewart makes good on his liability as above shown, I believe that the paper taken out in lieu of his \$50,000 payment should be retained by the bank as extra security against the stuff retained by the bank, if it could be done.

I have been quite outspoken in this matter so far as this communication is concerned (have personally written this stuff up so that even my stenographer will know nothing of it) and am passing it all along to you for what it is worth. Mr. Carothers, George and I agree on the values and would be willing to take a chance on a new deal on this basis if Stewart can be made to come through with enough funds to liquify part of his stuff. Unless he does so I would not care to assume the years of worry and grief that are bound to follow the present condition.

Respectfully submitted,

L. M. PLAMONDON.

Filed March 30, 1922. G. H. Marsh, Clerk. [206]

#### Plaintiffs' Exhibit No. 20.

(COPY.)

#### WOODLAND STATE BANK.

Woodland, Wash., March 14, 1921.

Mr. Claude P. Hay,

Bank Commissioner,

Olympia, Washington.

Dear Sir:

Attached hereto is the report of examination of the notes and bills receivable of the Kelso State Bank after a somewhat hurried examination by F. M. Carothers, Geo. F. Palmondon, F. L. Stewart and myself, Mr. Stewart dissenting for the most part to the value we have placed on the paper.

This list covers only such paper as in my opinion requires shrinkage, and unlisted paper will be acceptable, under the circumstances in a reorganization, assuming that your department will allow reasonable time to work it out.

Yours very truly, L. M. PLAMONDON.

Filed March 30, 1922. G. H. Marsh, Clerk. [207]

#### Plaintiffs' Exhibit No. 21.

(COPY.)

#### KELSO STATE BANK.

Kelso, Wash., March 14, 1921.

Mr. Claude P. Hay,

State Bank Commissioner,

Olympia, Washington.

Dear Mr. Hav:

Mr. Carothers and I have been conferring this evening over the situation here and have decided to call upon you for assistance and advice.

The situation has been fully explained to you in the communication which you have received from L. N. Plamondon, copy of which we have before us. Now the key to the difficulty seems to us to Stewart. He apparently has Mr. he effort whatsoever to arrange his part no solution, except that we believe he the planning to go to California at an early date. He seems to have the idea in his head that we have taken over the burden here, and that we will accept his paper on guarantee for the \$96,000 listed in L. N.'s letter. You can readily see that it would be impossible to do this. Mr. Carothers and I have mutually agreed to ask you to make a trip down. so that you and L. N. Plamondon, Mr. Carothers. Mr. Stewart and myself can have a night conference and thresh the thing out. You could get here on the train that arrives at 8:20 and we could get busy the same night. You can 'phone me or better

yet, 'phone Lou at Woodland and say when. The sooner the better.

Respectfully yours, GEO. F. PLAMONDON.

Filed March 30, 1922. G. H. Marsh, Clerk. [208]

#### Plaintiffs' Exhibit No. 22.

(COPY.)

March 15, 1921.

Mr. L. M. Plamondon, President.

Woodland State Bank,

Woodland, Washington.

Dear Sir:

Your three letters of March 14th have been received and contents carefully noted.

I am somewhat surprised at the large amount of questionable paper which you have found in the Kelso State Bank. While I anticipated that there would be a number of items which would not be accepted at the value placed on same by Mr. Stewart, it never occurred to me that there would be so many items upon which a difference of opinion existed. I shall endeavor to give this matter my personal attention in the near future and I am today calling Mr. Carothers on the 'phone and advising him that this department will grant the five additional days for the purpose of collecting the stock assessment. I assume that the directors of the bank will leave no stones unturned in their efforts to bring about a speedy adjustment of matters criticised.

236 Fidelity & Deposit Co. of Maryland et al.

Kindly advise me from time to time how things are progressing, and oblige.

Yours very truly,

Bank Commissioner.

Filed March 30, 1922. G. H. Marsh, Clerk. [209]

#### Plaintiffs' Exhibit No. 23.

(COPY.)

March 15, 1921.

F. M. Carothers, President, Kelso State Bank, Kelso, Washington.

Dear Sir:

I am just in receipt of a letter from Mr. L. M. Plamondon in which he states that it is your desire that this department give you an extension of five days for the purpose of collecting the assessment levied against the stock of your bank. Mr. Plamondon suggested that I telephone you, which I agreed to do. However, on second thought I have decided that it might be better to advise you by letter rather than to take a chance of there being eaves droppers who might overhear our conversation over the wire.

I trust that you will be able to complete the collection of your assessment within the additional time allowed.

Yours very truly,

Bank Commissioner.

Filed March 30, 1922. G. H. Marsh, Clerk. [210]

#### Plaintiffs' Exhibit No. 24.

#### THE UNITED STATES NATIONAL BANK.

United States Depositary.

Portland, Oregon.

Kelso State Bank,

Kelso, Washington.

Your note in favor of this bank will be due at this bank 3-8-21.

Total .....\$7,655.06

No. A36881.

Checks on other banks must be certified. Please bring this notice with you.

N. B.—Repurchase Agreement. [211]

#### Plaintiffs' Exhibit No. 25.

Kelso State Bank.

Kelso, Washington, March 7, 1921.

The United States National Bank,

Portland, Oregon.

#### Gentlemen:

Attention Mr. Dick, Vice-President.

We are returning herewith your notice of 8th inst. maturity of \$7,655.06.

If it is possible we would like to arrange an extention until the 15th or 20th of this month on this item. If this is agreeable to you, please forward us a new re-purchase agreement for, let us say, fifteen days.

238 Fidelity & Deposit Co. of Maryland et al.

Thanking you in advance, we are

Very truly yours,

GEO. F. PLAMONDON,

GFP-W.

Encl.

Filed March 30, 1922. G. H. Marsh, Clerk. [212]

#### Plaintiffs' Exhibit No. 26.

March 8, 1921.

Asst. Cashier.

Mr. George F. Plamondon, Asst. Cashier.

Kelso State Bank,

Kelso, Washington.

Dear Mr. Plamondon:

Your letter of the 7th instant received, relative to repurchase agreement covering balance of warrants amounting to \$7,613.62, and note that you desire an extension of fifteen days.

We hand you new agreement covering time, as requested.

The writer regretted not being able to see you Saturday. The matter of furnishing you with bonds available for your county funds has been discussed. Under the National Bank Act this is equivalent to a loan and the matter, therefore, would have to be treated as bills payable of your bank. Under recent correspondence with Mr. Stewart our arrangement is that the bank loans will be retired from this source.

We presume that you have given consideration to

the matter of furnishing a surety bond instead of securities.

Yours very truly,

Vice-President.

ALT:EB. [213]

#### Plaintiffs' Exhibit No. 28.

THE UNITED STATES NATIONAL BANK. No. 469. Portland, Ore., 3-14-21.

Received from Kelso State Bank, Kelso, Washington.

For safe keeping only and at your risk securities purporting to be as follows:

Cowlitz County Warrants.....\$33,471.59

Held as security for deposits of county funds-County Treasurer, Kalama, Wash.

W. P. CHOATE,

Teller.

March 30, 1922. G. H. Marsh, Clerk. [214]

#### Plaintiffs' Exhibit No. 29.

Kalama, Washington, April 5, 1920.

Board of County Commissioners met in regular session pursuant to adjournment. Present: Albert Maurer, Chairman, E. E. Dale and D. J. Hille, Commissioners. R. A. Davis, Clerk of Board.

In the matter of Depositary Bonds of the following banks, Kalama State Bank and Kelso State Bank, bonds approved and signed by Chairman of Board of County Commissioners.

240 Fidelity & Deposit Co. of Maryland et al.

No further business Board adjourned to meet April 6th at 9 o'clock A. M.

ALBERT MAURER, Chairman.

Attest: R. A. DAVIS, Clerk of Board. [215]

PLAINTIFFS' EXHIBIT No. 29—Cont'd.

State of Washington, County of Cowlitz,—ss.

#### CERTIFICATE OF TRANSCRIPT.

I, R. A. Davis, Auditor of said County, do hereby certify that the foregoing is a true and correct copy of minutes as the same appears in the Commissioners' Journal under date of April 5, 1920, as the same appears of record on page 622 record of Commissioners' Journal volume number 9 of the records of said county.

Witness my hand and official seal, this 25th day of March, A. D. 1922.

(Seal)

R. A. DAVIS, County Auditor. [216]

### PLAINTIFFS' EXHIBIT No. 29-Cont'd.

Kalama, Washington, March 9, 1921.

Board of County Commissioners met in regular session pursuant to adjournment—Present: Albert Maurer, Chairman, J. C. Ferguson and P. A. Parker, Commissioners; R. A. Davis, Clerk of Board.

In the matter of Depositary Bond of Kelso State Bank with Fidelity and Deposit Company of Maryland, presented by County Treasurer, L. P. Brown, on motion of Ferguson-Parker same was approved and signed.

No further business, on motion Parker-Ferguson Board adjourned.

ALBERT MAURER,

Chairman.

Attest: R. A. DAVIS, Clerk of Board. [217]

PLAINTIFFS' EXHIBIT No. 29—Cont'd. Form 11½.
State of Washington.

County of Cowlitz,—ss.

#### CERTIFICATE OF TRANSCRIPT.

I, R. A. Davis, Auditor of said County, do hereby certify that the foregoing is a true and correct copy of minutes as the same appear in The Commissioners' Journal, as the same appears of record on page 125 record of Commissioners' Journal volume number 10 of the records of said County.

Witness my hand and official seal this 25th day of March, A. D. 1922.

Bond No. 26355

\$20 000 00

## DEPOSITARY BOND TO THE

## TREASURER OF COWLITZ COUNTY. KELSO STATE BANK.

(Principal)

## MARYLAND CASUALTY COMPANY,

(Surety)

KNOW ALL MEN BY THESE PRESENTS: That we, Kelso State Bank, a banking corporation organized and existing under the laws of the State of Washington and authorized to conduct business (State of Washington or United States of America)

in the State of Washington, under the laws thereof, having an office and principal place of business at Kelso, Cowlitz County, Washington, as principal (City)

and MARYLAND CASUALTY COMPANY (Surety Company), a corporation organized and existing under the laws of the State of Maryland, and authorized to conduct business in the State of Washington under the laws thereof, having an office and principal place of business at Tacoma, Pierce (City)

County, Washington, and there conducting a general surety business, as surety, are held and firmly bound unto LINUS PERRY BROWN, the County Treasurer of Cowlitz County, State of Washington, or his successor or successors, in the just and full sum of TWENTY THOUSAND DOLLARS (\$20-000,00), lawful money of the United States of America, for the payment of which, well and truly to be made, we do hereby bind ourselves, our and

each of our successors and assigns, jointly and severally firmly by these presents

SIGNED, SEALED AND DATED this 15th day of March, 1920.

WHEREAS, the principal in this bond has been designated by the county treasurer of said Cowlitz County, as a depositary for public funds held and required to be kept by him as treasurer, pursuant to Chapter 51 of the Session Laws of 1907 as amended by Chapter 15 of Session Laws of 1909, being Section 5072 et seq., of Remington & Ballinger's Annotated Codes and Statutes of Washington, pursuant to and in conformity with which said laws this bond is made, [219] executed and delivered; and

WHEREAS, the amount of such funds upon deposit and to be deposited with said principal, is subject to withdrawal, increase or decrease as said County Treasurer may determine; and

WHEREAS, said bank has contracted to pay said county interest upon the average daily balance the said principal shall have upon deposit for the month or any fraction thereof next preceding the crediting of such interest, which interest shall be computed and credited to the account of said treasurer, and become thenceforth a part of such deposit;

NOW THEREFORE, the condition of this obligation is such that if said principal shall, at the beginning of each month, render to the said treasurer a statement showing the daily balance of such county moneys held by it during the month next

preceding and the interest thereon and how the same has been credited, and shall well and truly keep all such sums of money so deposited or to be deposited and the interest thereon, subject at all times to the check and order of said treasurer, and shall make prompt and faithful payments thereof on checks drawn by such treasurer to the extent of all moneys upon deposit by such treasurer with said principal and shall promptly and faithfully calcuate, credit and pay such treasurer harmless and indemnified for and by reason of making said deposit or deposits then this obligation shall be void; otherwise to be in full force and effect.

THIS BOND IS EXECUTED AND ACCEPTED UNDER THE FOLLOWING AGREEMENTS:

First: The above-named surety shall have the right to terminate its liability hereinunder by serving written notice of its election so to do upon the county treasurer of said county, and thereupon the said surety shall be discharged from any liability hereunder for any default of the said principal occurring after the expiration of thirty days from and after the service of such notice. [220]

Second: The above-named surety shall be liable hereunder for such proportion of the moneys deposited with said principal by the county treasurer of said county, and payment of which is refused by said principal upon demand of the county treasurer of said county as provided in the condition of this bond as the penalty of this bond bears to the total amount of depositary bonds and other securi-

ties for deposits furnished by the above-named principal to the county treasurer of said county; provided, however, that if such other bonds or securities are insufficient for any reason to fully make together, with the aforesaid proportion under this bond, the full amount of principal and interest demanded and refused and interest thereafter accruing to time of actual payment to the county treasurer of said county, or if the surety on any other such bond shall have been adjudged to be or be insolvent then and in that event the surety hereunder shall be liable to the county treasurer of said county to the full amount of loss sustained by reason of such insufficiency.

Third: The total liability of the above mentioned surety hereunder shall not exceed the penalty of this bond.

IN WITNESS WHEREOF, The said principal has caused this instrument to be executed and its corporate seal to be attached by its officers thereunto duly authorized, and the said surety has caused this instrument to be executed and its corporate seal to be attached by its officers thereunto duly authorized, the day and year above written.

KELSO STATE BANK,
(Principal.)
By GEO. N. PLAMONDON,
(Authorized Officer.)

246 Fidelity & Deposit Co. of Maryland et al.

Attest: ELDEN B. DUNHAM,

(As to Principal.)

(Seal) MARYLAND CASUALTY COMPANY,

(Surety.)

By H. T. HANSEN. (Seal)

L. A. WIDELL.

This bond approved this 5th day of April 1920.

ALBERT MAURER,

Chairman.

Chairman of Board of County Commissioners.

LINUS PERRY BROWN,

County Treasurer.

WILLIAM STUART,

Prosecuting Attorney. [221]

Form 11½.

State of Washington,

County of Cowlitz,—ss.

CERTIFICATE OF TRANSCRIPT.

I, R. A. Davis, Auditor of said County, do hereby certify that foregoing is a true and correct copy of DEPOSITARY BOND.

as the same appears of record of original bonds in hands of County Treasurer.

WITNESS my hand and official seal this 25th day of March, A. D. 1922.

(Seal)

R. A. DAVIS, County Auditor.

Bond No. 26356

\$40 000 00

### DEPOSITARY BOND.

TO THE

TREASURER OF COWLITZ COUNTY.
KELSO STATE BANK.

(Principal)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND (Surety).

KNOW ALL MEN BY THESE PRESENTS: That we, Kelso State Bank, a banking corporation organized and existing under the laws of the State of Washington and authorized to conduct business in the State of Washington, under the laws thereof, having an office and principal place of business at Kelso, Cowlitz County, Washington, as principal (City)

and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized and

(Surety Company) existing under the laws of the State of Maryland, and authorized to conduct business in the State of Washington under the laws thereof, having an office and principal place of business at Tacoma, Pierce County, Washington, and there (City)

conducting a general surety business, as surety, are held and firmly bound unto LINUS PERRY BROWN, the County Treasurer of Cowlitz County, State of Washington, or his successor or successors, in the just and full sum of Forty Thousand and no/100 Dollars (\$40 000 00), lawful money of the United States of America, for the payment of which, well and truly to be made, we do hereby bind ourselves, our and each of our

successors and assigns, jointly and severally firmly by these presents.

SIGNED, SEALED AND DATED this 15th day of March, 1920.

WHEREAS, the principal in this bond has been designated by the county treasurer of said Cowlitz County, as a depositary for public funds held and required to be kept by him as treasurer, pursuant to Chapter 51 of the Session Laws of 1907 as amended by Chapter 15 of Session Laws of 1919, being Section 5072 et seq. of Remington & Ballinger's Annotated Codes and Statutes of Washington, pursuant to and in conformity with which said laws this bond is made, [223] executed and delivered; and

WHEREAS, the amount of such funds upon deposit and to be deposited with said principal, is subject to withdrawal, increase or decrease as said County Treasurer may determine; and

WHEREAS, said bank has contracted to pay said county interest upon the average daily balance the said principal shall have upon deposit for the month or any fraction thereof next preceding the crediting of such interest, which interest shall be computed and credited to the account of said treasurer, and become thenceforth a part of such deposit;

NOW THEREFORE, the condition of this obligation is such that if said principal shall, at the beginning of each month, render to the said treasurer a statement showing the daily balance of such county moneys held by it during the month

next preceding and the interest thereon and how the same has been credited, and shall well and truly keep all such sums of money so deposited or to be deposited and the interest thereon, subject at all times to the check and order of said treasurer, and shall make prompt and faithful payments thereof on check drawn by such treasurer to the extent of all moneys upon deposit by such treasurer with said principal and shall promptly and faithfully calculate, credit and pay such interest as aforesaid, and in all respects save and keep said county and said treasurer harmless and indemnified for and by reason of making said deposit or deposits then this obligation shall be void; otherwise to be in full force and effect.

THIS BOND IS EXECUTED AND ACCEPTED UNDER THE FOLLOWING AGREEMENTS:

First: The above-named surety shall have the right to terminate its liability hereinunder by serving written notice of its election so to do upon the county treasurer of said county, and thereupon the said surety shall be discharged from any liability hereunder for any default of the said principal occurring after the expiration of thirty days from and after the service of such notice. [224]

Second: The above-named surety shall be liable hereunder for such proportion of the moneys deposited with said principal by the county treasurer of said county, and payment of which is refused by said principal upon demand of the county treasurer of said county as provided in the condition of this bond as the penalty of this bond bears to the total amount of depositary bonds and other securities for deposits furnished by the above-named principal to the county treasurer of said county; provided, however, that if such other bonds or securities are insufficient for any reason to fully make together, with the aforesaid proportion under this bond, the full amount of principal and interest demanded and refused and interest thereafter accruing to time of actual payment to the county treasurer of said county, or if the surety on any other such bond shall have been adjudged to be or be insolvent then and in that event the surety hereunder shall be liable to the county treasurer of said county to the full amount of loss sustained by reason of such insufficiency.

Third: The total liability of the above-mentioned surety hereunder shall not exceed the penalty of this bond.

IN WITNESS WHEREOF, The said principal has caused this instrument to be executed and its corporate seal to be attached by its officers thereunto duly authorized, and the said surety has caused this instrument to be executed and its corporate seal to be attached by its officers thereunto duly authorized, the day and year above written.

KELSO STATE BANK,

Principal.

By GEO. F. PLAMONDON,

(Its Assistant Cashier,)
(Authorized Officer.)

Attest: ELDEN B. DUNHAM,

(As to Principal.)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

(Surety)

By H. T. HANSEN. (Seal)

L. A. WIDELL.

This bond is approved this 5th day of April, 1920. ALBERT MAURER,

Chairman of Board of County Commissioners.

LINUS PERRY BROWN,

County Treasurer.

WILLIAM STUART,

Prosecuting Attorney. [225]

State of Washington,

County of Cowlitz,—ss.

CERTIFICATE OF TRANSCRIPT.

I, R. A. Davis, Auditor of said County, do hereby certify that the foregoing is a true and correct copy of

#### DEPOSITARY BOND

as the same appears of record of original bond in hands of County Treasurer.

WITNESS my hand and official seal this 25th day of March, A. D. 1922.

(Seal)

R. A. DAVIS, County Auditor.

Deputy. [226]

Bond No. 27718.

\$10,000.00

# DEPOSITARY BOND TO THE

TREASURER OF COWLITZ COUNTY. KELSO STATE BANK.

(Principal.)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, (Surety.)

KNOW ALL MEN BY THESE PRESENTS: That we, Kelso State Bank, a banking corporation organized and existing under the laws of the State of Washington and authorized to conduct business in the state of Washington, under the laws thereof, having an office and principal place of business at Kelso, Cowlitz County, Washington, as principally

cipal and FIDELITY AND DEPOSIT COM-PANY OF MARYLAND, a corporation organized and existing under the laws of the State of Maryland, and authorized to conduct business in the State of Washington under the laws thereof, having an office and principal place of business at Tacoma, (City)

Pierce County, Washington, and there conducting a general surety business, as surety, are held and firmly bound unto L. P. BROWN, the County Treasurer of Cowlitz County, State of Washington, or his successor or successors, in the just and full sum of TEN THOUSAND & no/100 Dollars (\$10,000.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we do hereby bind ourselves, our and each of our suc-

cessors and assigns, jointly and severally firmly by these presents.

SIGNED, SEALED AND DATED this 7th day of March, 1921.

WHEREAS, the principal in this bond has been designated by the county treasurer of said Cowlitz County, as a depositary for public funds held and required to be kept by him as treasurer, pursuant to Chapter 51 of the Session Laws of 1907 as amended by Chapter 15 of Session Laws of 1909, being Section 5072 et seq. of Remington & Ballinger's Annotated Codes and Statutes of Washington, pursuant to and in conformity with which said laws this bond is made, [227] executed and delivered; and

WHEREAS, the amount of such funds upon deposit and to be deposited with said principal, is subject to withdrawal, increase or decrease as said County Treasurer may determine; and

WHEREAS, said bank has contracted to pay said county interest upon the average daily balance the said principal shall have upon deposit for the month or any fraction thereof next preceding the crediting of such interest, which interest shall be computed and credited to the account of said treasurer, and become thenceforth a part of such deposit;

NOW THEREFORE, the condition of this obligation is such that if said principal shall, at the beginning of each month, render to the said treasurer a statement showing the daily balance of such county moneys held by it during the month next preceding and the interest thereon and how the same has been credited, and shall well and truly keep all

such sums of money so deposited or to be deposited and the interest thereon, subject at all times to the check and order of said treasurer, and shall make prompt and faithful payments thereof on checks drawn by such treasurer to the extent of all moneys upon deposit by such treasurer with said principal and shall promptly and faithfully calculate, credit and pay such interest as aforesaid, and in all respects save and keep said county and said treasurer harmless and indemnified for and by reason of making said deposit or deposits then this obligation shall be void; otherwise to be in full force and effect.

#### THIS BOND IS EXECUTED AND ACCEPTED FOLLOWING UNDER THE AGREE-MENTS:

First: The above named surety shall have the right to terminate its liability hereinunder by serving written notice of its election so to do upon the county treasurer of said county, and thereupon the said surety shall be discharged from any liability hereunder for any default of the said principal occuring after the expiration of thirty days from and after the service of such notice. [228]

Second: The above-named surety shall be liable hereunder for such proportion of the moneys deposited with said principal by the county treasurer of said county, and payment of which is refused by said principal upon demand of the county treasurer of said county as provided in the condition of this bond as the penalty of this bond bears to the total amount of depositary bonds and other securities for deposits furnished by the above-named principal to the county treasurer of said county; provided, however, that if such other bonds or securities are insufficient for any reason to fully make together, with the aforesaid proportion under this bond, the full amount of principal and interest demanded and refused and interest thereafter accruing to time of actual payment to the county treasurer of said county, or if the surety on any other such bond shall have been adjudged to be or be insolvent then and in that event the surety hereunder shall be liable to the county treasurer of said county to the full amount of loss sustained by reason of such insufficiency.

Third: The total liability of the above mentioned surety hereunder shall not exceed the penalty of this bond.

IN WITNESS WHEREOF, The said principal has caused this instrument to be executed and its corporate seal to be attached by its officers thereunto duly authorized, and the said surety has caused this instrument to be executed and its corporate seal to be attached by its officers thereunto duly authorized, the day and year above written.

KELSO STATE BANK. (Seal)
(Principal.)
By GEO. F. PLAMONDON,
Its Assistant Cashier,
Authorized Officer.

As to Principal.

EIDELITY AND D

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND. (Surety.)
I. C. ROWLAND. (Seal)

256 Fidelity & Deposit Co. of Maryland et al.

This bond is approved this 9th day of March, 1921.

ALBERT MAURER,

Chairman of Board of County Commissioners.

L. P. BROWN,

County Treasurer.

WILLIAM STUART,

Prosecuting Attorney. [229]

State of Washington, County of Cowlitz,—ss.

#### CERTIFICATE OF TRANSCRIPT.

I, R. A. Davis, Auditor of said County, do hereby certify that the foregoing is a true and correct copy of

#### DEPOSITARY BOND

as the same appears of record of original bond in hands of County Treasurer.

WITNESS my hand and official seal this 25th day of March, A. D. 1922.

R. A. DAVIS,

(Seal)

County Auditor.

Deputy.

Filed March 30, 1922. G. H. Marsh, Clerk. [230]

#### Plaintiffs' Exhibit No. 30.

RELEASE, ASSIGNMENT AND AGREEMENT.
WHEREAS, the FIDELITY & DEPOSIT
COMPANY OF MARYLAND, was surety on a depositary bond given to Linus Perry Brown as
County Treasurer of Cowlitz County, Washington,
by the KELSO STATE BANK, of Kelso, Wash-

ington, for FORTY THOUSAND DOLLARS (\$40,000.00) to secure the payment of deposits made by the said treasurer in said bank, which said bond was dated on or about March 15, 1920, and

WHEREAS the said Kelso State Bank was closed by the State Banking authorities on March 17, 1921, and on that date taken over for liquidation by the banking department of the State of Washington; and

WHEREAS, at the time of the closing of said Kelso State Bank there was on deposit in said bank to the credit of the said County Treasurer, the sum of SIXTY-FOUR THOUSAND FOUR HUNDRED SIXTY & 96/100 (\$64,460.96) DOLLARS, and there was also on said date due the said treasurer by the said bank interest at the rate of 2% on the average daily balance of said bank for the period from March 1, 1921, to said March 17, 1921, which said interest amounted to \$31.53, making the total amount due said County Treasurer of \$64,492.49.

AND WHEREAS, the said FIDELITY & DE-POSIT COMPANY OF MARYLAND is liable under its aforementioned bond for FOUR-SEV-ENTHS (4/7) of the said sum of \$64,492.49, which said four-sevenths (4/7) amounts to \$36,852.86, together with interest thereon at the rate of 2% per annum from and after the 17th day of March, 1921, the time of the failure of said bank, amounting to \$77.78, and amounting in all to \$36,930.64.

NOW, THEREFORE, in consideration of the said sum of \$36,930.64 paid to me by the said FIDELITY & DEPOSIT COMPANY OF MARY-

LAND receipt whereof is hereby acknowledged, I hereby release, satisfy and discharge any and all liability of the said FIDELITY & DEPOSIT COMPANY OF MARYLAND, on the aforementioned bond of the Kelso State Bank, and I hereby acknowledge receipt in full of the amount which was deposited [231] in said Kelso State Bank, and for which it was liable to me at the time of its failure, and I hereby cancel and release the said bond of the Fidelity & Deposit Company of Maryland above referred to.

IN CONSIDERATION OF THE PREMISES I hereby transfer and assign to the said Fidelity & Deposit Company of Maryland my claim and demand as depositor and creditor of the Kelso State Bank for the amount paid by the said Fidelity & Deposit Company of Maryland as above set forth, to-wit: the sum of \$36,852.86, and I authorize and empower the Fidelity & Deposit Company of Maryland to make claim against the Kelso State Bank or its legal representative therefor.

WITNESS my signature at Kalama, Washington, this 25th day of April, 1921.

#### LINUS PERRY BROWN,

County Treasurer of Cowlitz County, Washington. [232]

RELEASE, ASSIGNMENT AND AGREEMENT. WHEREAS, the FIDELITY & DEPOSIT COMPANY OF MARYLAND was surety on a depository bond given to Linus Perry Brown as County Treasurer of Cowlitz County, Washington, by the KELSO STATE BANK, of Kelso, Washington, for

TEN THOUSAND DOLLARS (\$10,000.00), to secure the payment of deposits made by the said treasurer in said bank, which said bond was dated on or about March 7, 1921, and

WHEREAS the said Kelso State Bank was closed by the State Banking authorities on March 17, 1921, and on that date taken over for liquidation by the banking department of the State of Washington; and

WHEREAS, at the time of the closing of said Kelso State Bank there was on deposit in said bank to the credit of the said County Treasurer, the sum of SIXTY-FOUR THOUSAND FOUR HUNDRED SIXTY & 96/100 (\$64,460.96) DOLLARS, and there was also on said date due the said treasurer by the said bank interest at the rate of 2% on the average daily balance of said bank for the period from March 1, 1921, to said March 17, 1921, which said interest amounted to \$31.53, making the total amount due said County Treasurer of \$64,492.49.

AND WHEREAS, the said FIDELITY & DE-POSIT COMPANY OF MARYLAND is liable under its aforementioned bond for one-seventh (1/7) of the said sum of \$64,492.49, which said one-seventh (1/7) amounts to \$9,213.20, together with interest thereon at the rate of 2% per annum from and after the 17th day of March, 1921, the time of the failure of said bank, amounting to \$19.45, and amounting in all to \$9,232.65.

NOW, THEREFORE, in consideration of the said sum of \$9,232.65, paid to me by the said Fidelity & Deposit Company of Maryland, receipt

whereof is hereby acknowledged, I hereby release satisfy and discharge any and all liability of the said Fidelity & Deposit Company of Maryland on the aforementioned bond of the Kelso State Bank, and I hereby acknowledge receipt in full of the amount which was deposited [233] in said Kelso State Bank, and for which it was liable to me at the time of its failure, and I hereby cancel and release the said bond of the Fidelity & Deposit Company of Maryland above referred to.

IN CONSIDERATION OF THE PREMISES I hereby transfer and assign to the said Fidelity & Deposit Company of Maryland my claim and demand as depositor and creditor of the Kelso State Bank for the amount paid by the said Fidelity & Deposit Company of Maryland as above set forth, to-wit: the sum of \$9,213.20, and I authorize and empower the Fidelity & Deposit Company of Maryland to make claim against the Kelso State Bank or its legal representative therefor.

WITNESS my signature at Kalama, Washington, this 25th day of April, 1921.

#### LINUS PERRY BROWN,

County Treasurer of Cowlitz County, Washington. [234]

RELEASE, ASSIGNMENT AND AGREEMENT.
WHEREAS, the MARYLAND CASUALTY
COMPANY was surety on a depository bond given
to Linus Perry Brown as County Treasurer of
Cowlitz County, Washington, by the KELSO
STATE BANK, of Kelso, Washington, for
TWENTY THOUSAND DOLLARS (\$20,000.00),

to secure the payment of deposits made by the said treasurer in said bank, which said bond was dated on or about March 15, 1920, and

WHEREAS the said Kelso State Bank was closed by the State Banking authorities on March 17, 1921, and on that date taken over for liquidation by the banking department of the State of Washington; and

WHEREAS, at the time of the closing of said Kelso State Bank there was on deposit in said bank to the credit of the said County treasurer, the sum of SIXTY-FOUR THOUSAND FOUR HUNDRED SIXTY & 96/100 (\$64,460.96) DOLLARS, and there was also on said date due the said treasurer by the said bank interest at the rate of 2% on the average daily balance of said bank for the period from March 1, 1921, to said March 17, 1921, which said interest amounted to \$31.53, making the total amount due said County Treasurer of \$64,492.49.

AND WHEREAS, the said MARYLAND CAS-UALTY COMPANY is liable under its aforementioned bond for two-sevenths (2/7) of the said sum of \$64,492.49, which said two-sevenths (2/7) amounts to \$18,426.43, together with interest thereon at the rate of 2% per annum from and after the 17th day of March, 1921, the time of the failure of said bank, amounting to \$38.89, and amounting in all to \$18,465.32.

NOW, THEREFORE, in consideration of the said sum of \$18,465.32 paid to me by the said MARYLAND CASUALTY COMPANY, receipt

whereof is hereby acknowledged, I hereby release, satisfy and discharge any and all liability of the said MARYLAND CASUALTY COMPANY on the aforementioned bond of the Kelso State Bank, and I hereby acknowledge receipt in full of the amount which was deposited [235] in said Kelso State Bank, and for which it was liable to me at the time of its failure, and I hereby cancel and release the said bond of the MARYLAND CASUALTY COMPANY above referred to.

IN CONSIDERATION OF THE PREMISES I hereby transfer and assign to the said Maryland Casualty Company my claim and demand as depositor and creditor of the Kelso State Bank for the amount paid by the said Maryland Casualty Company as above set forth, to-wit: the sum of \$18,426.43, and I authorize and empower the Maryland Casualty Company to make claim against the Kelso State Bank or its legal representative therefor.

WITNESS my signature at Kalama, Washington, this 25th day of April, 1921.

#### LINUS PERRY BROWN,

County Treasurer of Cowlitz County, Washington. Filed March 30, 1922. G. H. Marsh, Clerk. [236]

### Plaintiffs' Exhibit No. 31.

COPY.

THE UNITED STATES NATIONAL BANK.
Portland, Oregon, 3/14/21.

No. 1469.

Received from Kelso State Bank.

Address: Kelso, Washington,

For safekeeping only and at your risk securities purporting to be as follows:

Cowlitz County Warrants ......33 491 59 NOT NEGOTIABLE

Held as security for deposits of county funds—County Treas. Kalama, Washington.

(Rubber Stamp) PAUL S. DICK, Cashier-Prest.

(Signed) W. R. CHOATE, Teller. [237]

## 264 Fidelity & Deposit Co. of Maryland et al.

## WARRANTS.

Cowiltz C	ounty, Wash-	School Wa	rrants, Dist.
ington.	Diking Dis-	#36	
trict #	1.	*	
2.55	10 23	30 00	23 59
1 35	10 24	40 00	23 58
3 00	10 01	<b>1</b> 5 00	23 46
8 70	10 22	500 00	23 67
2 40	10 20	50 00	23 68
299 95	10 35	500 00	23 65
500 00	10 34		
198 53	10 36	1 135 00*	
3 10	10 14		
6 00	9 98		
3 75	10 35	Diking	District #8
9 20	10 42		
1 038 53*		*	
Dikin	g Dist. #2	37 49	2 03
		20 60	2 07
		17 50	2 21
144 50*	4 30*	67 50	2 29
		18 00	2 35
Diking	District #4	25 90	2 34
		7 20	2 41
		7 98	2/39
500 00	9 74	5 98	2 38
500 00	9 75	7 75	2 36
500 00	9 73	8 97	2 32
500 00	9 72	8 50	2 28
500 00	9 76	7 84	2 04
168 00	9 89	3 12	2 05
17 00	10 38	3 25	2 06

Diking	District #4—	Diking D	District #8—
Continued	l.	Continued.	
7 35	10 47	3 80	2 14
54 84	10 26	1 10	2 22
12 75	10 39	31	2 23
8 50	10 40	9 05	2 26
57 59	10 63	13 50	2 49
323 34	10 45	39 50	2 50
372 00	10 24	, 46 70	2 51
76 84	10 27	101 95	252
500 00	10 22	76 35	2 53
20 50	10 21		
98 09	10 17	539 84*	
60 34	10 34		
60 34	<b>1</b> 0 3 <b>2</b>		
$22 \ 00$	10 36	Diking	Dist. #9.
60 34	10 29		
20 95	10 55	*	
19 00	10 54	2 44	1
87 76	10 56	7 00	5
52 11	10 53	3 50	6
30 17	10 52	10 48	11
16 00	10 51	3 33	19
43 88	10 50	9 93	16
43 88	10 48	36 68*	
47 88	10 49		
18 15	10 42	Diking	Dist. #10.
159 28	10 41	*	
85 02	10 64	23 20	2 85
119 64	10 59	51 80	2 87
13 00	10 58	24 34	2 69
2 74	10 57	4 99	2 63

266 Fidelity & Deposit Co. of Maryland et al.

Diking	District #4—	Cowlitz Co.,	Wash.
Continued	ł.	Continued.	
2 25	10 23	9 36	2 73
60 34	10 30	<b>1</b> 9 34	2 65
11 62	10 16	500 00	1 15
5 01	9 82	500 00	1 16
2 50	9 88	500 00	1 17
10 26	9 90	500 00	1 18
3 00	9 91		
[238]			
Diking	District #4—	Diking District	#10
Cont'ed		cont'ed.	
10 75	9 98	2 133 03*	
8 35	10 06		
2 25	10 12		
5 295 59*			
Diking	District #6		
3 00	5 27		
8 23	5 26		
111 76	5 19		
65 83	5 20		
218 91	5 17		
95 76	5 28		
46 62	5 18		
19 00	5 21		
60 00	5 16		
2 74	5 29		
41 14	5 24		
84 74	5 22		
11 97	5 09		
3 10	5 04		

# Diking District #6—Continued.

опиниеа.	
4 00	5 14
11 97	5 12
10 97	5 10
1 99	5 02
9 97	5 08
6 99	5 15
29 96	4 43
17 97	4 07
39 94	4 05
39 94	4 04
10 98	4 03
68 92	4 02
19 97	4 01
22 70	4 23
11 25	4 22
19 50	$4\ \ 21$
16 75	4 17
19 97	4 38
29 96	4 39
88 28	4 15
<b>1</b> 3 <b>7</b> 3	4 37
38 95	4 36
37 45	4 35
27 46	4 34
38 45	4 32
38 45	4 31
32 95	4 47
22 47	4 46
73 64	4 45
23 97	4 44

268 Fidelity & Deposit Co. of Maryland et al.

Diking District	#6	•	
Continued.			
32 45	4 42		
34 95	4 41		
47 94	4 69		
37 50	4 57		
117 32	4 76	Diking Dist.	#6 con-
60 42	4 68	t'ed.	
27 47	4 65	17 98	2 81
140 82	4 79	30 00	2 44
171 31	4 77	15 75	2 45
24 72	4 61	11 90	2 48
147 38	4 53	49 92	2 50
16 60	4 56	39 94	2 52
24 97	4 66	9 99	2 55
24.50	1 95	<b>1</b> 6 92	2 60
62 95	1 94	23 95	2 27
15 98	2 80	31 46	2 29
		35 23	2 30
[239]			
19 96	2 33	5 00	3 96
32 55	2 19	5 50	4 00
11 55	2 67	2 00	4 13
67 40	3 39	8 00	4 24
35 95	3 40	4 99	4 28
47 95	3 41	3 00	4 29
79 88	3 42	7 49	4 40
53 90	3 43	5 49	4 63
59 91	3 44	5 49	4 64
36 20	3 45	5 99	4 70
26 20	3 46	5 99	2 32
39 96	3 47	8 52	4 83

Diking	District	#6	Diking 1	District #6—
Continued	1.		Continued	•
24 96		3 48	9 00	4 96
64 90		3 49	5 99	4 97
27 46		3 50	4 99	4 98
19 97		3 51	6 00	4 99
39 95		3 52	4 99	2 12
22 48		3 53		
30 62		3 07	5200 40*	
25 12		3 08		
20 00		3 13		
32 05		3 14		
39 52		3 16		
263 90		3 17	Diking	District #1.
41 20		3 18	*	
95 82		3 20	35 00	9 99
25 95		3 24	19 26	10 11
29 95		3 28	14 46	10 09
54 92	49/	3 30	43 82	10 08
37 50		3 06	67 53	10 07
9 98		2 96	12 86	10 05
73 90		3 04	57 73	~10 04
<b>1</b> 3 97		2 92	60 00	10 27
42 44		3 38	184 60	10 43
65 92		3 37	74	10 46
47 17		3 36	11 25	10 77
55 95		3 35	2 50	10 76
39 96		3 34	<b>120 10</b>	10 80
<b>17</b> 48		3 33	51 00	10 81
22 47		3 95	15 21	10 78
29 96		3 94	52 50	10 79
14 98		3 93	62 50	10 29

Diking Dist	rict #1.—	Diking Di	strict #6—
Continued.		Continued.	.,
24 98	392	144 50	4 34
43 92	3 82		
47 00	3 79	955 56*	
12 85	3 65		
19 98	3 61		
22 48	3 62		
49 43	3 97	Diking D	istrict #6.
9 98	3 98		
23 97	3 99	95 76*	5 23
10 98	4 11		
<b>7 1</b> 0	5 01		
11 75	2 20		
2 50	1 98	Diking Di	istrict #2.
3 80	1 99	152 05*	4 35
1 50	1 97		
1 50	242		
1 40	2 39	Diking Di	strict #4.
7 99	2 56		
8 00	2 61	*	
5 99	2 53	$22 \ 30$	11 12
5 26	262	218 91	11 11
7 99	2 90	19 57	9 78
7 98	2 86	<b>1</b> 3 00	9 77
2 00	2 95	30 63	10 07
1 25	3 05	<b>24</b> 68'	10 03
3 00	3 15	13 17	9 97
5 99	3 21	16 50	9 93
4 99	3 32	14 12	9 92
1 99	3 60	121 20	10 92
9 98	3 59	94 63	11 04

Diking	District #6—	Diking Dis	strict #6—
3 99	3 57	2 74	10 98
7 99	3 56	47 95	10 72
7 98	3 54	430 63	<b>10</b> 73
[240]			
86 78	10 88		
74 07	10 89		
101 28	10 91		
38 40.	10 94		
54 85	10 99		
68 56	11 00		
28 00	11 01		
88 28	11 02		
5 99	11 07		
31 56	11 05		
8 90	11 08		
3 25	11 09		
10 97	10 95		
29 93	10 85		
68 57	10 86		
25 00	10 87		
13 71	10 84		
2 01	10 75		
112 17	10 90		
84 75	11 03		
383 50	10 80		
158 80	10 81		
34 45	10 79		
4 25	10 78	G	
9 50	10 76		
24 45	11 10		

## 272 Fidelity & Deposit Co. of Maryland et al.

Diking Dis	trict #6—	Diking Di	strict #6—
5 75	10 71		
77 15	10 70		
41 90	10 97		
60 34	10 31		
2807 15*			
City of Rain	nier War-		
rants.	,		
500 00	8 80		
500 00	8 79		
500 00	8 78		
500 00	8 77		
281 83	8 95		
500 00	8 76		
500 00	8 75		
500 00	8 74		
500 00	8 73		
500 00	8 72		
361 55	8 94		
5 143 38*			
[241]			
Drainage Dis	strict #3		
Clarke Co.,	Washing-		
ton, Warra	nts.		
215 00	80	9 98	22
77 42	90	21 96	16
6 92	87	17 00	- 02
28 85	88	27 46	23
15 23	79	43 96	17
17 05	94	4 98	2 26
518 60	1 18	19 95	2 01

Drainage Distr	rict #3-	_	
Continued.			
150 00	1 17	42 38	2 02
96 00	1 07	115 53	1 36
80 00	1 01	27 20	1 37
811 51	1 00		
41 37	99	1 918 01*	
200 00	98		
118 51	1 00	School I	District #—
79 16	1 04	Cowlitz	Co., Wash.
207 70	1 05		
161 53	1 06	56 38	1 52
25 00	1 09	110 00	71
9 00	1 10	140 00	93
55 77	1 14	28 20	24 85
<b>1</b> 5 00	1 03	6 70	24 73
179 16	97	5 40	24 72
2 408 37	-	9 45	24 86
		43 50	24 89
		60 00	24 68
		40 00	24 67
		150 00	24 40
		166 66	24 39
		25 00	24 60
Road District	# 1,	9 60	24 24
Cowlitz Co.,	Wash.	<b>21</b> 30	24 19
Warrants.		46 80	24 18
55 82	1 45	73 90	24 16
33 89	1 44	21 00	24 14
164 74	1 96	35 00	24 09
164 74	2 19	40 00	24 11
55 82	1 39	43 75	24 61

52 3	36	2 (	06 25	00	24 65
33 8	39	1 4	40	00	24 69
45 8	34	1 4	12 26	3 25	24 34
62 3	33	1 4	<b>11</b> 240	00	24 37
27 9	1	1 8	<b>54</b> 90	00	24 66
87 2	26	1 9	7 115	00	24 00
104 7	4	2 2	20 3	02	2 34
34 9	)1	1 8	3 212	2 00	2 37
10 0	00	1 2	29. 5	5 00	2 33
53 8	32	1 4	10 35	00	2 35
57 8	38	5	<b>59</b> 42	2 50	2 31
19 9	96	6 2	<b>26</b> 432	2 00	05
19 9	)6 F	6	27 110	00	10 27
<b>51</b> 9	90		<b>25</b> 135	00	3 28
67 8		6 2	24 151	60	4 00
37 9	- 3	•	<b>5</b> 6 <b>5</b>	80	4 04
77 0	00	1	2 115	5 00	4 01
16 7	<b>'</b> 0	]	.0 7	70	4 06
9 3	30	(	6 37	65	11 44
1 8	80	1 1	15		
<b>15</b> 9	77	(	55		
43 0	)5	3 ]	.9		
15 9	97	2	29		
27 9	98	2	20		
52 4	12	(	61		
19 9	96	(	52		
63 8	38	Ę	58		
[242]					
60 (		4 (	)3		
12 7	2	24 7	78		

	125	00	*	25	11
	40	00		25	26
	125	00		25	18
	<b>1</b> 35	00		25	07
	25	00		25	22
	110	00		10	50
	160	00		2	09
	77	50		2	10
	115	00		25	17
	115	00		25	13
	11	20		1	64
	166	66		24	97
	99	50		3	89
	90	00		25	23
	<b>4</b> 0	00		25	24
	18	00		25	28
	5	00		25	27
4	491	74*			
			3	Reca	p.
			1	038	53
				144	50
			5	295	59
		,	1	<b>1</b> 35	00
				539	84
				36	
			2	133	03
			5	196	<b>4</b> 0
				955	56

95 76 152 05 2 807 15

5 143 38

2 408 37

4 491 74

31 573 58\*

31 573 58

1 918 01

33 491 59\*

Filed March 30, 1922. G. H. Marsh, Clerk. [243]

### Plaintiffs' Exhibit No. 32.

KELSO STATE BANK.

Kelso, Washington, November 2, 1921.

Messrs. Grinstead & Laube,

Attorneys, Colman Building,

Seattle, Washington.

Attention Mr. Grinstead.

#### Gentlemen:

I arrived here Friday evening very weary and by the time I reached home Saturday evening I was ready for the sick bed. I suffered from a severe sick headache until Tuesday afternoon and arrived here at noon to-day, not well, of course, but much improved.

I saw Judge Miller yesterday for about ten minutes. He told me he had had a letter from you as to a meeting and we agreed on Monday at ten o'clock A. M. if that meets your convenience and I think he is to write you. I showed him the copy

of receipt you had suggested and he remarked he saw no particular objection to it. He was on his way to Portland and I could have but a few minutes.

As you will observe I have taken the liberty to rewrite the receipt and if you will pardon the apparent egotism I believe I improved it or at least made it express more concisely the manner of tender and acceptance. I am tendering the checks as authorized by the court in my dividend order; you accept them as such if the courts hold that is all you are entitled to but with the reservation of your right to prosecute a suit for a preference and in the event the courts award you a preference this payment could not be construed otherwise than as a payment on account the payment of which I would be bound to make in full regardless of whether I now pay a part. [244]

If this meets your approval kindly date and sign and mail to me original keeping duplicate for your files. If for any reason you disapprove kindly return to me the checks by registered mail.

Truly and sincerely yours,
T. H. ADAMS,

Special Deputy Supervisor of Banking, Liquidating Kelso State Bank.

REGISTER.

Received of T. H. Adams, Special Deputy Supervisor of Banking, Liquidating Kelso State Bank, the sum of Nine Thousand Two Hundred Thirteen and 22/100 Dollars (\$9 213 22) to apply on account of claims of the undersigned now on file with the

said Deputy Supervisor of Banking, on account of Depositary Bonds No. 1769847 and No. 1861587. The undersigned claims that the above-mentioned claims are for trust deposits and that it is therefore entitled to payment in full and not merely to dividends as a general creditor. The above payment is tendered in the form of checks designated as Dividend No. 1 for 10% and Dividend No. 2 for 10% of the total claims of the undersigned, but they are accepted by the undersigned only with the express understanding that such acceptance is in no way to be construed as a waiver of the right of the undersigned to a preferred claim or the right to prosecute a suit in the courts to establish a preferred claim. If the courts shall award the undersigned merely a general claim, then these checks are, of course, to apply as dividends as indicated on their face, but if the courts award the undersigned a preferred claim, then these checks shall apply merely as a payment on account. [245]

PLAINTIFFS' EXHIBIT No. 32—Cont'd.

November 4, 1921.

Mr. T. H. Adams,

Special Deputy Supervisor, Liquidating Kelso State Bank, Kelso, Washington.

Re: F. & D.-U. S. Nat'l Bank.

Dear Sir:

We acknowledge with thanks your letter of November 2d. To us the receipt as prepared by you is clearly in better form than the one which I dictated when you were here, and I see no reason why it should not be signed. However, since I represent the surety and can communicate with them, I am taking the liberty of holding the checks for a few days until the Company passes upon the form of receipt, to which I trust you will have no objection.

Respectfully,

LG-MS.

Filed March 30, 1922. G. H. Marsh, Clerk. [246]

### Defendants' Exhibit "A."

WOODLAND STATE BANK,

Woodland, Washington, March 14, 1921.

Mr. Claude P. Hay, Bank Commissioner, Olympia, Washington.

Dear Mr. Hay:

Mr. Carothers has requested me to write you and ask for five days more time to collect the assessment, as the peak of the county deposit will be reached this week, and he dislikes to do anything that may cause a flurry or lead to the county treasurer's not building up his balance at this time. It is absolutely essential that the public funds come in as usual in order to make a clean-up of the rediscounts

If you will kindly call up Mr. Carothers at Kelso and advise him without stating the matter so that

280 Fidelity & Deposit Co. of Maryland et al.

the telephone girl gets it, I shall appreciate it. Sincerely yours.

L. N. PLAMONDON.

Received March 15, 1921. State Bank Examiner, Olympia, Washington.

Filed March 30, 1922. G. H. Marsh, Clerk.

### Defendants' Exhibit "B."

#### KELSO STATE BANK.

Kelso, Wash., 3-14-21.

U. S. Nat'l Bank, Portland.

We enclose for Collection and Credit, items marked X Protest.

Respectfully,
F. L. STEWART,
Cashier.

Report by No. 356.

Dearm on	Amount	Date	Number	Drawn by	Last Indorser L. P. Brown
Drawn on Pope & Talbot	32,897.97	2-26	890	Puget Mill	L.I. DIOWE
San Francisco 24-4	6,500.00 39,397.97	314	54725	106 Co.	υ.

Filed March 30, 1922. G. H. Marsh, Clerk. [247]

#### KELSO STATE BANK.

Kelso, Washington, 3-14-21.

U. S. Nat'l Bank, Portland.

We enclose for collection and credit items Marked X Protest.

Respectfully,
F. L. STEWART,
Cashier.

Report by No. 356.

Drawn on Pope & Talbot San Francisco	Amount 32,897.97	Date 2-26	Number 890	Drawn by Puget Mill Co.	Last Indorser L. P. Brown
24-4	6,500.00 Checks 39,397.97	3–14	54725	106	ਹ.

Filed March 30, 1922. G. H. Marsh, Clerk. [248]

### Defendants' Exhibit "C."

Transcript from the General Ledger of the Kelso State Bank showing the Individual Deposits subject to check from January 27, 1921, to March 17, 1921.

January '21.	Checks	Deposits	Balance
27	8 774 71	3 036 53	216 090 44
28	$2\ 354\ 53$	2 361 90	216 270 24
29	4 734 68	2 817 32	214 300 17
31	8 761 50	7 721 64	213 101 76
February			
1	8 059 04	5 227 74	210 676 59
2	8 042 86	5 713 74	208 712 82
3	4 113 60	7 328 27	211 069 09

282 Fid	lelity d	De	posit	Co.	of	Mary	land	et	al.
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4	5 267 66	7 364 74	213 287 37
5	5 360 78	7 085 60	214 842 44
7	$7\ 524\ 24$	8 621 88	216 107 86
8	7 398 98	13 688 63	223 043 78
9	9 995 81	4 801 59	217 148 90
10	6 723 01	6 753 62	217 189 65
11	6 438 09	$4\ 369\ 45$	215 196 96
14	13 583 36	21 728 59	223 657 25
15	18 145 21	14 742 83	219 934 41
16	4 781 79	3 490 43	218 721 91
17	9 921 25	8 608 61	219 088 07
18	5 652 84	9 661 43	223 151 67
19	7 153 54	3 901 85	219 916 93
21	9 165 14	10 507 95	$220\ 504\ 64$
23	10 342 36	6 169 67	216 609 26
24	5 184 38	7 162 20	218 787 04
25	6 546 73	5 672 26	218 258 00
26	7 823 06	3 181 19	213 633 08
28	7 689 20	8 860 95	215 053 88
March			
1	$4\ 219\ 21$	5 139 07	215 520 36
2	9 919 89	9 839 31	215 448 89
3	7 392 99	5 098 33	213 247 39
4	6 693 50	7 477 11	214 102 25
5 111	5 313 86	4 388 30	213 249 26
7	7 871 09	12 816 05	218 260 08
8	5 857 19	7 874 86	220 401 45
9	8 046 54	12 748 00	225 019 15
10	9 249 51	9 855 77	225 726 11
11	5 002 86	18 202 42	238 790 61
12	12 712 31	5 277 10	231 334 79

14	10	774	20	47	911	24	268	570	22
15	16	083	08	5	272	58	257	772	02
16	12	373	21	7	828	61	256	312	66
17	3	965	33	2	427	65	254	737	51
17*	٠	206	76		134	20	254	665	58

<sup>\*</sup>Corrected Balance.

Filed March 30, 1922. G. H. Marsh, Clerk. [249]

### Defendants' Exhibit "D."

(Six Checks.)

Kelso, Washington, July 30, 1921.

Kelso State Bank.

Dividend check.

#### COWLITZ VALLEY BANK.

Pay to the order of FIDELITY & DEPOSIT COMPANY \$3,685.29, Thirty-six hundred eighty-five dollars twenty-nine cents.

T. H. ADAMS,

Special Deputy Supervisor of Banking, Liquidating Kelso State Bank.

Dividend No. 1-10%.

Endorsements on back:

Pay to the order of any banker or trust company. All prior endorsements guaranteed.

November 18, 1921.

FIDELITY TRUST COMPANY, BALTI-MORE, MD.

GEO. L. MAHLER, Treasurer.

For deposit with The Fidelity Trust Company.

284 Fidelity & Deposit Co. of Maryland et al.

To the credit of Fidelity & Deposit Company of Maryland.

November 18, 1921.

ROLAND BENJAMIN, Treasurer.

Pay to the order of any bank or banker. Prior endorsements guaranteed.

November 21, 1921.

FIRST NATIONAL BANK IN ST. LOUIS, MO.

C. L. ALLEN, Cashier.

Pay to the order of any bank, banker, or trust company. Prior endorsements guaranteed.

November 25, 1921.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Portland Branch.

PAID 11-26-21. [250]

Kelso, Washington, July 30, 1921.

Kelso State Bank.

Dividend check.

#### COWLITZ VALLEY BANK.

Pay to the order of Fidelity & Deposit Company \$3,685.29, Thirty six hundred and eighty-five dollars twenty-nine cents dollars.

Dividend No. 2-10%.

T. H. ADAMS,

Special Deputy Supervisor of Banking Liquidating Kelso State Bank.

Endorsements on back:

For deposit with the Fidelity Trust Company.

To the credit of Fidelity & Deposit Company of Maryland.

November 18, 1921.

ROLAND BENJAMIN, Treasurer.

Pay to the order of any bank, banker, or trust company. All prior endorsements guaranteed.

November 18, 1921.

FIDELITY TRUST COMPANY, BALTI-MORE, MARYLAND.

GEO. L. MAHLER, Treasurer.

Pay to the order of any bank or banker. Prior endorsements guaranteed.

November 21, 1921.

FIRST NATIONAL BANK IN ST. LOUIS, MO.

C. L. ALLEN, Cashier.

Pay to the order of any bank, banker, or trust company. Endorsements guaranteed.

November 25, 1921.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Portland Branch.

PAID 11-26-21. [251]

Kelso, Washington, July 30, 1921.

Kelso State Bank.

Dividend check.

COWLITZ VALLEY BANK.

Pay to the order of FIDELITY & DEPOSIT COMPANY \$921.32, Nine hundred twenty-one dollars thirty-two cents dollars.

286 Fidelity & Deposit Co. of Maryland et al.

Dividend No. 1-10%.

T. H. ADAMS,

Special Deputy Supervisor of Banking Liquidating Kelso State Bank.

Endorsements on back:

Pay to the order of any bank, banker, or trust company. All prior endorsements guaranteed.

November 18, 1921.

FIDELITY TRUST COMPANY, BALTI-MORE, MARYLAND.

GEORGE L. MAHLER, Treasurer.

For deposit with The Fidelity Trust Company. To the credit of Fidelity & Deposit Company of Maryland.

November 18, 1921.

ROLAND BENJAMIN,

Pay to the order of any bank or banker. All prior endorsements guaranteed.

November 19, 1921.

FIRST NATIONAL BANK IN ST. LOUIS, MO.

Pay to the order of any bank, banker, or trust company. Prior endorsements guaranteed.

November 25, 1921.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Portland Branch.

PAID 11-26-21. [252]

Kelso, Washington, July 30, 1921.

Kelso State Bank.

Dividend check.

COWLITZ VALLEY BANK.

Pay to the order of MARYLAND CASUALTY

COMPANY \$1,842.64, Eighteen hundred forty-two dollars sixty-four cents dollars.

Dividend No. 2-10%.

T. H. ADAMS,

Special Deputy Supervisor of Banking Liquidating Kelso State Bank.

Endorsements on back:

Pay to the order of any bank or banker. All prior endorsements guaranteed.

August 9, 1921.

MARLYAND TRUST COMPANY, BALTI-MORE, MARYLAND.

JERVIS SPENCER, Jr., Treasurer.

Pay to the order of Maryland Trust Company. All prior endorsements guaranteed.

MARYLAND CASUALTY COMPANY, J. H. PATTON, Treasurer.

Pay to the order of any bank or banker. Prior endorsements guaranteed.

August 12, 1921.

UNION TRUST COMPANY, CHICAGO, ILL.

F. P. SCHREIBER, Cashier.

Pay to the order of any bank, banker, or trust company. Prior endorsements guaranteed.

August 15, 1921.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Portland Branch.

PAID 8-16-21. [253]

Kelso, Washington, July 30, 1921.

Kelso State Bank.

COWLITZ VALLEY BANK.

Pay to the order of FIDELITY & DEPOSIT COMPANY \$921.32, Nine hundred twenty-one dollars thirty-two cents dollars.

Dividend No. 2-10%.

T. H. ADAMS,

Special Deputy Supervisor of Banking Liquidating Kelso State Bank.

Endorsements on back:

To the credit of Fidelity & Deposit Company of Maryland.

November 18, 1921.

ROLAND BENJAMIN, Treasurer.

For deposit with The Fidelity Trust Company. To the credit of Fidelity & Deposit Company of Maryland.

November 18, 1921.

ROLAND BENJAMIN, Treasurer.

Pay to the order of any bank, banker, or trust company. All prior endorsements guaranteed.

November 18, 1921.

FIDELITY TRUST COMPANY, BALTI-MORE, MARYLAND.

GEO. L. MAHLER, Treasurer.

Pay to the order of any bank or banker. Prior endorsements guaranteed.

November 21, 1921.

FIRST NATIONAL BANK IN ST. LOUIS, MO.

C. L. ALLEN, Cashier.

Pay to the order of any bank, banker, or trust company. Prior endorsements guaranteed.

November 25, 1921.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Portland Branch.

PAID 11-26-21. [254]

Kelso, Washington, July 30, 1921.

Kelso State Bank.

Dividend check.

# COWLITZ VALLEY BANK.

Pay to the order of MARYLAND CASUALTY COMPANY \$1,842.64, Eighteen hundred forty-two dollars sixty-four cents dollars.

Dividend No. 1-10%.

# T. H. ADAMS,

Special Deputy Supervisor of Banking Liquidating Kelso State Bank.

Endorsements on back:

Pay to the order of Maryland Trust Company.

All prior endorsements guaranteed.

# MARYLAND CASUALTY COMPANY. J. H. PATTON, Treasurer.

Pay to the order of any bank or banker. All prior endorsements guaranteed.

August 9, 1921.

MARYLAND TRUST COMPANY,
BALTIMORE, MARYLAND.
JERVIS SPENCER, Jr., Treasurer.

Pay to the order of any bank or bankers. Prior endorsements guaranteed.

290 Fidelity & Deposit Co. of Maryland et al.

August 12, 1921.

# UNION TRUST COMPANY, CHICAGO, ILL.

F. P. SCHREIBER, Cashier.

Pay to the order of any bank, banker, or trust company. Prior endorsements guaranteed.

August 15, 1921.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Portland Branch.

PAID 8-16-21.

Filed March 30, 1922. G. H. Marsh, Clerk. [255]

AND AFTERWARDS, to wit, on Tuesday, the 22d day of August, 1922, the same being the 43d judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [256]

In the District Court of the United States for the District of Oregon.

E-8573.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, et al.,

Complainants and Appellants,

VS.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, a Corporation, et al.,

Defendants,

KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington,

Appellees.

Order Specifying Exhibits to be Included With Evidence and to Send Certain Original Exhibits to Court of Appeals.

Upon application of the above-named plaintiffs and appellants for a modification of the order made and entered herein on the 17th day of August, 1922, settling the statement of evidence and directing the Clerk of this Court to certify the original exhibits in the above-entitled cause to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,—

It is hereby ORDERED that said order be modified, and that certified copies of all of the exhibits in

the above-entitled case, except Plaintiffs' Exhibits 1, 2 and 27, be forwarded to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of the originals as required by said order of August 17th, and that plaintiffs' original exhibits numbered 1, 2 and 27 be certified to the Clerk of the Circuit Court of Appeals in lieu of copies.

Done in open court this 22d day of August, A. D. 1922.

### CHAS. E. WOLVERTON,

Judge.

Filed August 22, 1922. G. H. Marsh, Clerk. [257]

# Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America, District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing pages numbered from 4 to 257, inclusive, constitute the transcript of record on appeal from the decree of the said court in a cause in said court, wherein the Fidelity and Deposit Company of Maryland, a corporation, and Maryland Casualty Company, a corporation, are plaintiffs and appellants, and the United States National Bank of Portland, Oregon, a corporation, and the Kelso State Bank, an insolvent banking corporation, and John P. Duke, as Supervisor of

Banking of the State of Washington, in charge of and liquidating the assets of the Kelso State Bank, are defendants; and the said Kelso State Bank, an insolvent banking corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in charge of the liquidating the assets of the Kelso State Bank, are appellees; that I have prepared the said transcript of record in accordance with the praecipe for transcript filed by said appellants, and with the orders of said court, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe and orders, as the same appear of record and on file at my office and in my custody.

And I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record attached, the original citation filed in said cause.

I further certify that the cost of the foregoing [258] transcript is \$73.90, and that the same has been paid by the said appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this 23d day of August, 1922.

[Seal]

G. H. MARSH, Clerk. [259] [Endorsed]: No. 3920. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity and Deposit Company of Maryland, a Corporation, and Maryland Casualty Company, a Corporation, Appellants, vs. Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed September 1, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk. [260] In the District Court of the United States for the District of Oregon.

E-8573.

FIDELITY & DEPOSIT COMPANY OF MARY-LAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Plaintiffs,

VS.

THE UNITED STATES NATIONAL BANK, of PORTLAND (OREGON), a Corporation, and THE KELSO STATE BANK, an Insolvent Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of Liquidating the Assets of the Kelso State Bank,

Defendants.

# Order Extending Time to September 20, 1922, for Return to Citation on Appeal.

This matter coming on to be heard upon motion of the plaintiffs and appellants by Messrs. McCamant & Thompson and Grinstead & Laube, their attorneys, for an extension of time for the return of the citation on appeal herein, and upon consideration of the motion and good cause appearing,—

IT IS ORDERED that the time for the return of citation on appeal to the above-entitled cause, which was heretofore made returnable on the 21st day of August, 1922, be, and the same is hereby, extended thirty (30) days from the said 21st day of August, 1922, to the 20th day of September, 1922.

296 Fidelity & Deposit Co. of Maryland et al.

Done in open court this 16th day of August, A. D. 1922.

# CHAS. E. WOLVERTON, Judge. [261]

[Endorsed]: Original. No. E-8573. In the District Court of the United States for the District of Oregon. Fidelity & Deposit Company of Maryland, et al., Plaintiffs, vs. The United States National Bank of Portland, et al., Defendants. Order Extending Time to September 20, 1922, for Return to Citation on Appeal.

No. 3920. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 31, 1922. F. D. Monckton, Clerk.

# United States Circuit Court of Appeals

For The Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation.

Appellants,

VS.

Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

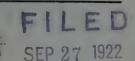
Appellees.

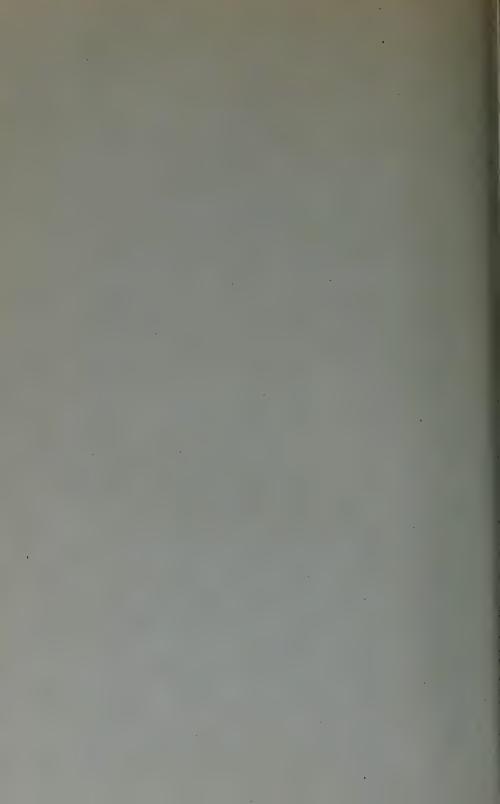
UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON HON. R. S. BEAN, District Judge.

# APPELLANTS' BRIEF

MCCAMANT & THOMPSON,
Northwestern Bank Bldg., Portland, Ore., and
GRINSTEAD & LAUBE,
314 Colman Bldg., Seattle, Washington,
Solicitors for Appellants.
WALLACE MCCAMANT, Portland, Oregon, and
LOREN GRINSTEAD, Seattle, Washington,
Of Counsel.

THE ARGUS PRESS, SEATTLE





# United States Circuit Court of Appeals

For The Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation.

Appellants,

VS.

Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON HON. R. S. BEAN, District Judge.

# APPELLANTS' BRIEF

McCamant & Thompson,
Northwestern Bank Bldg., Portland, Ore., and
GRINSTEAD & LAUBE,
314 Colman Bldg., Seattle, Washington,
Solicitors for Appellants.
Wallace McCamant, Portland, Oregon, and
Loren Grinstead, Seattle, Washington,

Of Counsel.



# United States Circuit Court of Appeals

For The Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation, Appellants,

VS.

Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank, Appellees.

No. 3920.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON HON. R. S. BEAN, District Judge.

# APPELLANTS' BRIEF

# STATEMENT OF THE CASE.

The Kelso State Bank of Kelso, Cowlitz County, Washington, closed its doors and was taken over by the banking department of the State of Washington on March 17, 1921. (R. 13, 31). At that time, the County Treasurer of Cowlitz County,

Washington, was credited on the books of the bank with deposits of funds belonging to Cowlitz County aggregating \$64,460.96 (R. 15, 16, 31), which were secured by depository bonds in the total penal sum of \$70,000.00 theretofore executed by the appellants, as sureties, and the Kelso State Bank, as principal; the Fidelity & Deposit Company of Maryland having executed, as surety, two bonds in the penal sum of \$40,000.00 and \$10,000.00, respectively, and the Maryland Casualty Company having executed one bond in the penal sum of \$20,000.00. After the bank closed, appellants paid the County Treasurer the amount credited to him on the books of the bank plus \$31.53 interest, the Fidelity & Deposit Company of Maryland paying five-sevenths of this amount, or \$46,066.06, and the Maryland Casualty Company paying two-sevenths, or \$18,-426.43 (R. 20, 21, 35). Upon making payments to the County Treasurer, the appellants took assignments of the claims of the Treasurer and of Cowlitz County against the Kelso State Bank (R. 256-262).

The County Treasurer had deposited county funds in the Kelso State Bank at various times prior to the 17th day of March, 1921, the last two deposits being made on March 9, 1921, and March 14, 1921, respectively (R. 17, 33). The deposit of March 9, 1921, amounted to \$6,752.55 and included one check signed by Ida C. Oxtoby, drawn on a San Francisco bank in the amount of \$5,136.41, payable to the County Treasurer in payment of taxes due Cowlitz County (R. 177, 204). The deposit of March 14,

1921, amounted to \$35,337.57 and included a draft of the Puget Mill Company on Pope & Talbot of San Francisco for \$32,897.97, payable to the Treasurer of Cowlitz County in payment of taxes due caid county (R. 177, 207).

On March 14, 1921, and after receiving the deposit of that date from the County Treasurer, the cashier of the Kelso State Bank took the Pope & Talbot draft for \$32,897.97 and some other cash items amounting to \$6,500.00 to the United States National Bank of Portland and used the same in repurchasing certain warrants which had theretofore been sold by the Kelso State Bank to the United States National Bank of Portland under certain repurchase agreements (R. 163, Plts. Ex. 27A-27B), (R. 162, 197, 198), using for this purpose the sum of \$33,491.59, the amount due the United States National Bank of Portland on the repurchase agreements (R. 165).

Upon repurchasing the warrants, the cashier of the Kelso State Bank left them with the United States National Bank of Portland and instructed it to place them in its safe keeping department and mail receipt therefor to the County Treasurer of Cowlitz County and to advise said Treasurer by telephone that the warrants were being held as security for the deposits of county funds of Cowlitz County in the Kelso State Bank (R. 165, 239). The United States National Bank of Portland did advise the Treasurer of this fact by telephone and issued receipt for the warrants as directed, but, by mis-

take, mailed the receipt to the Kelso State Bank (R. 165). The warrants are still in the possession of the United States National Bank in its banking house in Portland, Oregon, and said bank was made a party defendant to this action. At the trial, the United States National Bank disclaimed any interest in the warrants and offered to turn them in to the registry of the court and the court issued its order, pursuant to agreement of the other parties to the suit, directing said bank to keep the warrants until further order of the court and discharging said bank from liability (R. 63). The United States National Bank is not, therefore, interested in or a party to this appeal.

Appellants claim that they are entitled to recover said warrants upon the grounds, as alleged in the first cause of action of their amended bill of complaint:

- 1. That the moneys deposited in the Kelso State Bank by the County Treasurer on the 14th day of March, 1921, were deposited at a time when the Kelso State Bank was hopelessly insolvent within the knowledge of its officers and, by reason thereof, the title to the money did not pass to the bank, but constituted a trust fund in the hands of the Kelso State Bank, as Trustee, which trust fund was used to repurchase said warrants.
- 2. That the warrants in question were pledged as security for the deposits of the County Treasurer of Cowlitz County in the Kelso State Bank and that

appellants, as successors in interest of the County Treasurer and of Cowlitz County, are entitled to the possession of them so that they may be applied in payment of the County Treasurer's claim against the Kelso State Bank, which claim has been assigned to appellants.

When the Kelso State Bank closed, there was cash on hand amounting to \$17,189.32 (R. 93), and appellants, by their second cause of action, seek to recover this sum as a portion of the moneys deposited in the Bank by the County Treasurer under such circumstances that the title thereto did not pass to the Bank and that this much of the money so deposited by the County Treasurer remained in the Bank at all times after the same was deposited and passed into the hands of the defendant, John P. Duke, as Supervisor of Banking.

The court dismissed the amended bill of complaint and denied appellants any relief.

# ASSIGNMENT OF ERRORS.

Appellants assign errors as follows:

I.

That the court erred in dismissing the amended bill of complaint for want of equity.

II.

That the court erred in finding the issues in favor of the appellees.

#### III.

That the decree is against the manifest weight of evidence.

#### IV.

That the decree is contrary to law.

#### V.

That the court erred in failing to find the issues in favor of appellants on the first cause of action set out in the amended bill of complaint herein.

#### VI.

That the court erred in failing to find in favor of the appellants on the second cause of action stated in the amended bill of complaint herein.

#### VII.

That the court erred in holding that the warrants described in said complaint were not deposited with the United States National Bank of Portland, Oregon, as security for County funds deposited in the Kelso State Bank by the County Treasurer of Cowlitz County, Washington.

### VIII.

That the Court erred in failing to find that the warrants described in the amended bill of complaint were deposited with the United States National Bank of Portland, Oregon, as security for deposits of public moneys which the County Treasurer of Cowlitz County, Washington, had on deposit in the Kelso State Bank on the 14th day of March, 1921.

### IX.

That the Court erred in holding that the officers

of the Kelso State Bank did not believe that said bank was hopelessly insolvent on and prior to the 14th day of March, 1921, and at the time when the deposits of public moneys belonging to Cowlitz County, Washington, were made in said bank by the County Treasurer of Cowlitz County, Washington.

#### X.

That the Court erred in failing to find the warrants described in the amended bill of complaint were purchased or repurchased from the United States National Bank of Portland, Oregon, by the Kelso State Bank with moneys belonging to Cowlitz County, Washington, which moneys were trust funds in the hands of said Kelso State Bank.

# ARGUMENT.

The decision in this case involves both questions of fact and of law. As this is an equity case, it is tried in this court *de novo* and, if the lower court erred as to findings of fact or conclusions of law, this court will remedy that error so that complete justice may be done the parties.

Central Improvement Co. vs. Columbia Steel Co., 201 Fed. 811.

Appellants base their right to recover the warrants on two separate grounds:

First: That these warrants were purchased by moneys deposited by the County Treasurer of Cow-

litz County, Washington, in the Kelso State Bank under such circumstances that title to the same did not pass to the Kelso State Bank, but remained in the County Treasurer and that these appellants, as sureties, on the bonds of the Kelso State Bank to the County Treasurer are subrogated to the rights of the County Treasurer to recover the same.

Second: That the warrants were pledged by the Kelso State Bank with the United States National Bank of Portland as security for the deposits of the County Treasurer in the Kelso State Bank.

If appellants are entitled to recover the warrants on the first ground above stated, the second becomes immaterial; and, likewise, if they are entitled to recover on the second ground, the first becomes immaterial.

# I. TITLE DID NOT PASS.

The Kelso State Bank was hopelessly insolvent within the knowledge of its officers when it received the deposit of March 14, 1921.

It is alleged in paragraph VI of the amended bill of complaint:

"That, on the 17th day of March, 1921, said Kelso State Bank, being insolvent, refused to discharge its obligations in the ordinary course of banking business, and its affairs and assets were taken into the possession of said Claude P. Hay, then Bank Commissioner of the State of Washington, for liquidation and distribu-

tion; that ever since said 7th day of March, 1921, said Claude P. Hay, as Bank Commissioner, and said defendant, John P. Duke, as Supervisor of Banking, as successor to Claude P. Hay, has been and now is in possession of the business and affairs of said Kelso State Bank for the purpose of liquidating and administering the same; that, on the 17th day of March, 1921, said Kelso State Bank was and ever since has been and now is insolvent." (R. 13).

The answer to this paragraph is as follows:

"Answering paragraph VI these defendants admit that the said Kelso State Bank was on the 17th day of March, 1921, taken possession of by the banking department of the State of Washington for the purpose of liquidation, but these defendants allege that the affairs of said bank are now being liquidated by T. H. Adams, Special Deputy Supervisor of Banking of the State of Washington Liquidating the Kelso State Bank." (R. 31).

By failing to deny the allegations of the complaint relative to insolvency, respondent admitted the same.

The uncontradicated testimony of T. H. Adams, Special Deputy Supervisor of Banking and the officer in charge liquidating the Kelso State Bank, is:

"To sum it up substantially, the aggregate of the claims that have been approved is something in excess of \$360,000.00; and there is

about \$40,000.00 more claims that are asserted and still undetermined." (R. 99.)

"We have paid out in dividends twenty per cent of this \$360,000.00; and a little more than \$1,000.00 preferred; which would amount to approximately \$73,000.00 that has been paid in dividends, including the preferred." (R. 99.)

"If I might be permitted to sum it up about this way, that if the worst happened to us that could happen or that might happen in this matter, the litigations, and so on, that we might pay only ten or fifteen per cent more. If the best happened that could happen, we might pay thirty-five or forty per cent more. Eliminating the possibility of suit against the Board of Directors, I would say that forty per cent more is the maximum."

"In giving these figures, I have figured in returns from assessments levied on the stockholders; of which everything has been collected except Stewart's." (R. 97.)

The witness further testified that the bank was capitalized at \$25,000.00 and that there had been collected between \$12,000.00 and \$13,000.00 from stockholders, (R. 100.) and, in order to pay forty per cent more, the bank must recover the sum of \$20,000.00 from the surety on the cashier's bond. (R. 97.)

It, therefore, appears that, in order to pay a maximum dividend of not more than sixty per cent, the bank must recover approximately \$33,000.00

which could not be considered assets in determining whether it was solvent. Eliminating this \$33,-000.00, the bank had assets, at the best, worth about \$175,000.00 and, at the worst, about \$130,000.00, while its liabilities amounted to between \$360,-000.00 and \$400,000.00.

The condition of the bank on March 14, 1921, when it received the deposit from the County Treasurer, was no better than when it closed. None of the uncollectible claims originated subsequent to January 27, 1921, (R. 103) and it received from depositors approximately \$23,000.00 more than it paid out after the close of business on March 12, 1921, which was the last banking day prior to March 14th. (R. 283-Deft's Ex. C.) This, of course, included the deposit of the County Treasurer on March 14, 1921.

It is apparent from the above admissions and evidence that the bank was hopelessly insolvent on March 14, 1921.

#### KNOWLEDGE OF OFFICERS.

The evidence clearly showed that the officers of the Kelso State Bank knew that it was hopelessly insolvent when the deposit of March 14th, 1921, was made.

The appellees, in their answer, alleged:

"That during the time mentioned and referred to in the bill of complaint herein for several years prior thereto one F. L. Stewart was employed as the Cashier of the Kelso State

Bank and entrusted with the general management of the affairs of the bank and given control and possession of the funds, securities and properties of the bank; that from time to time the said F. L. Stewart juggled the accounts, misused and appropriated the funds of the bank, misused and mismanaged the assets of the institution and loaned the funds of the bank to irresponsible persons and by reason thereof the bank became unsound and the supervisor of Banking of the State of Washington took charge for the purpose of liquidating the affairs of the bank, and that during such time and at the time the deposits were made by the County Treasurer of Cowlitz County with the said Kelso State Bank the directors and other officers of the bank had no actual knowledge that the funds of the bank had been appropriated and embezzled by the cashier, and had no actual knowledge that the bank had become unsound or in an unsafe condition to continue business." (R. 38, 39.)

#### Mr. Adams testified:

"Of Mr. F. L. Stewart's indebtedness to the bank, there is one \$6,000.00 item and two items of about \$5,000.00. I am speaking of the notes Mr. Stewart had in the bank. He was not indebted to the bank in the sum of over \$100,000.00 in one way or another. He had placed in the bank certain paper, and in one way or another had taken credit for that, which I am

unable to realize on, if I can realize on at all; but there are some \$55,000.00 that I have based claim against the bonding company on as having been illegal. Unless I can recover from the bonding company in that suit, that \$55,000.00 is hopelessly lost. I have heard the administrator of the Stewart estate say that Stewart is absolutely insolvent; and he told me it was useless to file a claim; and that is my judgment of it." (R. 102, 103.)

"In my answer, I have alleged and believe it to be true, that F. L. Stewart, Cashier of Kelso State Bank, was guilty of criminal misconduct of the affairs of the bank. I do not believe I would want to undertake to say how much of the amount of money that was unlawfully abstracted by Mr. Stewart from the assets of the bank would be criminal and how much would not be. I do not think I would be competent to pass on that, but some \$60,000.00 has been taken from the bank in one manner or another by the sale to the bank of doubtful or worthless paper, or on his own note, or on some sort of paper or security that could be carried as an asset, which I think I would be safe in saving have no value as far as that amount of money is concerned. If I my explain my meaning, take a note of \$8,000.00 on which Mr. Stewart benefited \$1,000.00; there will be more than \$1,000.00 loss on that. And if I may put that construction on it, the entire

fifty-five or sixty thousand dollars is lost to the bank.

"The capital of the bank was \$25,000.00 and its surplus was claimed to be \$25,000.00; and in my opinion Mr. Stewart abstracted from the bank a larger sum of money in assets than its entire capital stock and surplus." (R. 107, 108.)

"The abstraction of assets from the bank by Stewart ran as far back as 1913, and probably before that. It was a sort of a case of robbing Peter to pay Paul. The first abstraction that we have discovered was a case wherein Mr. Stewart put some note in the bank, apparently his own, and credited an estate of which he was administrator. We were not able to determine why he credited the estate, but we assume that he had used the money of the estate and was replacing it. He probably replaced that note with something else at a later date. That was quite frequently done, that some of the paper that he was directly or indirectly responsible for would be paid by the substitution of something else which he was still responsible for in some form or other; and that condition obtained for a long time." (R. 110.)

On May 26, 1919, the Directors of the Kelso State Bank accepted a personal guaranty from the Cashier of notes and mortgages "up to a sum not to exceed \$50,000.00." (R. 108, 223.)

By letter of December 13, 1920, the Bank Com-

missioner notified the Cashier that a large amount of paper which the bank was carrying would have to be charged off or collected at once and generally criticized the condition of the bank, ending the letter as follows:

"The above instructions have been given only after the most careful consideration of the report of examination and of the events which occurred during the time the writer was in your bank at the time of the examination. I recall your statements with respect to many of the items listed above and believe that you feel that some of them are too severely criticized. I am frank to say, however, that I am convinced you are misleading yourself, and that before the entire matter is cleaned up your bank will have suffered a severe loss. You will consider the above instructions as definite. You will report to this department not later than December 31, 1920, showing what progress you have made toward complying with these instructions.

"You will report again not later than March 15, 1921. Your failure to show proper progress can only result in a special examination being made of your bank in order that we may determine what will be the proper course to pursue toward eliminating the objectionable items." (R. 228, 229.)

It is submitted that the above letter was notice to Stewart that failure to improve conditions prior to March 15, 1921, would result in a closing of the bank. It would seem evident that a special examination, after such notice, of a bank which was so insolvent that its assets were not worth more than fifty per cent of its liabilities would result only in such action.

The Examiner's report of November, 1920, listed \$114,041.15 of the bank's loans as subject to very severe criticism. (R. 213.) The condition, as outlined in that report, was called to the attention of Mr. Stewart, the Cashier, and Mr. Wallace, one of the directors. (R. 113.)

On March 6, 1921, the Bank Commissioner called a meeting of the officers and directors of the Kelso State Bank at Chehalis, Washington. At this meeting Mr. Carothers, President of the Bank, Mr. Plamonden, Assistant Cashier of the Bank and Mr. George Marsh, a director of the Bank, were present. The Bank Commissioner called their attention to the condition of the bank and notified them that an assessment on the capital stock of the bank would be levied immediately. On March 7, 1921, a 100% assessment was levied and the directors notified. (R. 118, 119, 219, 220, 221.)

Following the meeting at Chehalis on March 6, 1921, and the levy of assessment on March 7, 1921, Mr. George F. Plamonden, Assistant Cashier, Mr. Stewart, Cashier, Mr. Carothers, President, and Mr. Plamonden's brother made an examination of the assets of the Kelso State Bank, which examination was completed on the night of March 13, and

a report of the same sent to the Bank Commissioner under date of March 14, 1921. (R. 145, 146, 229, 233.) We quote from that report as follows:

"Nearly all of the paper in his cases can be classified as petrified assets, very little liquid, and the larger part valueless. I cannot see how it can ever be worked out as matters now stand, unless Mr. Stewart is able to pay a large part of his liability in cash and thus reduce the loans to a point justified by the deposits. I calculate Mr. Stewart's liability as follows:

Notes to bank as maker and en-

dorser .....\$20,352.40

Amount necessary to redeem stock now held by First National of

Special guarantee on notes..... 50,000.00

\$96,819.07

It will be absolutely out of the question in my mind for the reorganizers to take that much of Stewart's paper even though it be fully secured, for we shall find ourselves in the same condition as the bank now is, as to reserves, in a very short time, and therefore still pressure must be brought to bear on Stewart to get some money and at least reduce his liability to \$50,000.00 of well secured stuff. Should Stewart be able to do this, then I believe the bank will be solvent, though yet petrified to a somewhat lesser extent (sort of a semi-petrification, may

I say) but in a condition that can in the course of a year or two be worked out without loss to depositors or shareholders. At the present time I do not see anything to sell" (R. 230, 231).

On March 14, 1921, Mr. George F. Plamonden, Assistant Cashier, wrote a letter to the Bank Commissioner in which he stated that Mr. Stewart had apparently made no effort to arrange his part of the solution, except that he was planning to go to California at an early date and that it would be impossible for them (referring to himself and his brother) to accept Stewart's paper on a guaranty for \$96,000.00. He said this letter had been written after a conference with Mr. Carothers and requested the Bank Commissioner to come immediately to Kelso (R. 234, 235).

Mr. George F. Plamonden, Assistant Cashier, testified that, about a week before the bank closed, about the 10th of March, 1921 (R. 161), he had a conference with Mr. Stewart relative to what he (Stewart) would do in the event of the worst coming to the worst, in which he said: "Fred, in the event it were possible that you could not do your part in this, you would not do anything rash, now, would you?" (R. 147). He further stated that Stewart said that, in any event, he would not be silly enough to do anything rash, make away with himself, or anything of that sort (R. 148). He further testified that Mr. Stewart had sent a block of notes to a New York Bank for rediscount and that credit had been refused (R. 158).

All of the above testimony is uncontradicted and all of it was given by witnesses who were connected with the Kelso State Bank as officers, or with the banking department of the State of Washington. All of these witnesses were friendly to the appellees and were very careful to give their testimony in such manner as would indicate that they, personally, did not believe the bank was hopelessly insolvent prior to the time it closed. It was to their interests to favor appellees as much as possible in order to avoid criticism or possible criminal liability if they should admit that the bank was permitted to remain open after it had become hopelessly insolvent. However, we do not believe that any construction can be placed on this testimony other than that the bank was not only hopelessly insolvent, but that its insolvency was due to wrongful acts on the part of the Cashier and that the officers had full knowledge of its condition, at least on the 14th day of March, 1921, after the completion of the examination of the assets by the President, Cashier and Assistant Cashier of the bank.

The evidence above referred to clearly shows that the officers of the Kelso State Bank knew of its insolvent condition, at least prior to March 14, 1921. However, if they had not, in fact, known of its condition, the law would imply knowledge.

It is presumed that the officers of the bank knew that it was insolvent.

Beal v. City of Somerville, 50 Fed. 647. "If one is a banker or person doing a bank-

ing business and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore safely to be trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency. A man holding himself out as banker thereby gives public proclamation that he has money and property readily convertible into money in possession and subject to his control, and for that reason may be safely trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of people, especially with those unacquainted with the history and character of the man. With them the banker is intrusted with money merely because he is a banker and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity. For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurances of responsibility and surplus capital where neither exists. do so knowingly is to secure the confidence and hence obtain the money of the ignorant and unwary by an implied deception."

<sup>3</sup> R. C. L. 494, 495.

The Supreme Court of the State of Washington has stated the rule in no uncertain terms, in the case of *State v. Welty*, 118 Pac. 9, as follows:

"Under our statute knowledge of the bank's condition is both presumed and required. 'It is the imperative duty of such officers, when they receive deposits from the bank's patrons, to know that the bank is solvent, and if, under the circumstances, by the exercise of reasonable diligence such fact could have been ascertained, if by the exercise of such diligence in making an examination and inquiring in respect to the solvency or insolvency of the bank its true condition could have been discovered. then under such circumstances the presumption will be that they had knowledge of the bank's condition at the time the particular deposit was received.' State v. Quackenbush, 98 Minn. 515, 108 N. W. 953. Construing a statute subjecting an officer who 'has good reason to know' the insolvent condition to the offense, the same court says, in continuing: 'This rule is consistent with the general principle that a person is presumed to know what it is his duty to know'—citing cases. In State v. Cadwallader, 154 Ind. 607, 57 N. E. 512, it is said: 'It is the imperative duty of such officers, when they receive deposits from the bank's patrons, to know that the bank is solvent, if under the circumstances, by the exercise of reasonable diligence, such fact could have been ascertained. If, by the exercise of such diligence in making an examination and inquiry in respect to the solvency or insolvency of the bank, its true condition could have been discovered, then, under such circumstances, the presumption will be that they had knowledge.' See, also, Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447: McClure v. People, 27 Colo, 358, 61 Pac. 612; State v. Buck, 120 Mo. 479, 25 S. W. 573. 'Good reason to believe' implies not only knowledge, but an investigation into such facts as would give knowledge. Such investigation means, not a haphazard, casual investigation, but a reasonable investigation, diligent inquiry, and prudent search." (Italics ours.)

State v. Welty, 65 Wash. 244; 118 Pac. 9, 15. "It was only about one month from the date of the deposit until defendant's bank failed and closed its doors. This, of itself, had a strong tendency to show that the bank was in failing circumstances, if not, in fact, insolvent, at the time the deposit was received; and the law which makes its failure so recently thereafter prima facie evidence of knowledge upon the part of its officers that it was insolvent or in failing circumstances at that time is neither unjust nor unconstitutional. As a banker, it was defendant's business to know the financial condition of his bank at any and all times."

State v. Buck (Mo.), 25 S. W. 573, 577.

See also:

St. Louis and San Francisco R. Co. v. Johnston, 133 U. S. 566; 33 L. Ed. 683, 686.

McClure v. People (Colo.), 61 Pac. 612, 617.

Wasson v. Hawkins, 59 Fed. 233, 234.

Clark Sparks & Sons Horse & Mule Co. v.

Clark Sparks & Sons Horse & Mule Co. v. Americus National Bank, 230 Fed. 738, 740.

Orme v. Baker, 74 Ohio St. 338; 78 N. E. 439, 444; 113 Am. St. Rep. 968.

The trial court, apparently, based the decision in this case on certain language used by Judge Gray in the case of *Quinn v. Earle*, 95 Fed. 728, 732 (R. 71). However, the facts in that case were entirely different from those in the instant case.

In that case, the evidence clearly showed that a plan had been worked out, which had been agreed upon, whereby the indebtedness of the Cashier to the bank would be paid, and that the payment of this indebtedness would make the bank absolutely solvent. The persons who had agreed to furnish money to carry out said plan were so confident of the success of the same that they had advanced \$125,000.00 on December 21st and 22nd to carry the bank through the Clearing House on the morning of December 23rd, when it was expected a payment of \$643,000.00 would come to the bank which would have made it solvent. The Cashier had powerful friends, a syndicate of ample financial strength had been actually formed to put him in a position to relieve the bank of its embarrassment. The examination of the books of the bank had not been made at the time the deposit was received and, prior to the examination of the books, the officers of the bank, the Bank Examiner and the persons who were to furnish the money were confident that the plan would be carried out. This plan had been subscribed to by members of the Clearing House of Philadelphia, Presidents of Banks and Trust Companies, and provided for payment of \$643,000.00 in cash to the bank on account of the Cashier's indebtedness, to be paid on the morning of December 23, 1897. The examination was completed on the night of December 22nd and it was not until after that examination that the plan was abandoned. Immediately the bank was closed.

In the instant case, the examination of the books of the bank had been completed on the night of March 13, 1921, and the only hope which the officers had for relieving the situation had been abandoned (R. 230, 234). The assessment on the capital stock had been levied and the Cashier had not paid, and could not pay, his assessment or redeem his stock from the bank where it was placed as collateral (R. 230). He was so insolvent that it was useless to present any claims against his estate (R. 102, 103). The officers were facing a special examination by the Bank Commissioner if they could not show progress by March 15th (R. 229). In view of the knowledge acquired by the officers as a result of the examination of the assets of the bank, they

knew that a special examination of the bank could result in only one action, which was closing the bank, and clearly the Cashier, being absolutely insolvent, and having failed to raise any money from December 13th, 1920 (when he was notified that progress must be made before March 15, 1921 (R. 229), to March 13th, 1921, knew that any plan which depended on his furnishing over \$96,000.00 in cash must fail. Furthermore, there is no evidence that he had any promise of assistance or that the other officers believed he could raise the money. The evidence, on the contrary, clearly shows that the assistant cashier and the president believed he could not do so (R. 234).

Clearly, the facts in the instant case are not similar to those in the case of *Quinn v. Earle, supra*, and justify entirely opposite conclusions. Furthermore, the particular language which the court quoted from the *Quinn* case was not necessary to a decision in that case and is contrary to the well established rule that the law holds bankers to a higher degree of care and responsibility than individual traders or merchants.

St. Louis & San Francisc Co. v. Johnston, 133 U. S. 566; 33 L. Ed. 683, 686.

Hyland v. Roe (Wis.), 87 N. W. 252, 253. Higgins v. Hayden (Neb.), 73 N. W. 281, 282.

State v. Welty (Wash.), 118 Pac. 9, 15. 3 R. C. L. 494, 495.

RIGHT TO RECOVER DEPOSITS MADE IN INSOLVENT BANK, OR THEIR PROCEEDS.

The law, relative the right of a depositor to recover deposits made in an insolvent bank, or their proceeds, is clearly stated by the authorities as follows:

"Deposits taken by an insolvent bank under circumstances which are a fraud on the depositor are not included in the assignment and may be recovered by the owner.

"(2) What is Fraudulent Receiving. If the depositor would not have left his money had he known as much as the officers about the bank's condition, or if its condition was misrepresented to him with the view of influencing his conduct and had that effect, the taking of his deposit under these circumstances is a fraud on the depositor."

5 Cyc. 564.

"When a bank becomes insolvent it should decline to receive further deposits and should discontinue business; and if under such circumstances it continues to receive deposits, this is a fraud on depositors, and title to a deposit so received remains in the depositor who may follow and recover it, if it augmented the assets of the bank and can be identified. Acceptance of a deposit is a fraud within this rule, where the depositor would not have left his money had he known as much as the officers did about the bank's condition, or if its condi-

tion was misrepresented to him with the view of influencing his conduct and had that effect;" 7 C. J. 730.

"A deposit obtained by fraud, when a bank is hopelessly insolvent, creates a trust in favor of the depositor, and can be recovered from a receiver of the bank, even if the identical money deposited does not pass into his hands, where the funds received by him are in any event increased by the amount of the deposit, and the fact that the depositor was a stockholder in the bank does not affect his right to recover a deposit so made."

3 R. C. L. 557.

"The general rule, as laid down in a New York case, is that a depositor may recover funds deposited in a bank, if at the time of making the same the officer accepting the same had knowledge of the fact that the bank was hopelessly insolvent. The reason of the rule is, that the deposit is obtained by fraud."

McGee on Banks and Banking (3rd Ed.), 617-618.

The decisions in the Federal Courts are unanimous and exceedingly clear in support of the foregoing rule.

"This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the president of the bank was a member. The knowledge of the president was the knowledge of the bank.

Martin v. Webb, 110 U.S. 7, 15 (28: 49, 52): Manhattan Bank v. Walker, 130 U.S. 267 (32: 959); Cragie v. Hadley, 99 N. Y. 131. In the latter case it was held that the acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled the depositor to reclaim his drafts or their proceeds. And the Anonymous Case, 67 N. Y. 598, was approved, where a draft was purchased from the defendants, who were bankers, when they were hopelessly insolvent, to their knowledge, and the court held the defendants guilty of fraud in contracting the debt, and said their conduct was not like that of a trader 'who has become embarrassed and insolvent. and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. Nichols v. Pinner, 18 N. Y. 295; Brown v. Montgomery, 20 Id. 287; Johnson v. Monell, 2 Keyes 655; Chaffee v. Fort, 2 Lans. 81. But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity and thus obtain property which he had every reason to believe he could never pay for. In such a

case he does an act the necessary result of which will be to cheat and defraud another, and the intention to cheat will be inferred.' And it was decided that 'in the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders; and that 'a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act; i. e., to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business."

St. Louis & San Francisco Co. v. Johnston, 133 U. S. 566; 33 L. Ed. 683, 686.

See also the following cases:

Wasson v. Hawkins, 59 Fed. 233, 234.

Richardson v. New Orleans Co., 102 Fed. 780; 52 L. R. A. 67, 68.

Brennan v. Tillinghast, 201 Fed. 609, 615. In re Silver, 208 Fed. 797, 799.

McKinney v. U. S. Nat'l. Bank, 242 Fed. 48, 51 (C. C. A. 9th Circuit).

Titlow v. McCormick, 236 Fed. 209 (C. C. A. 9th Circuit).

Schuyler v. Littlefield, 232 U. S. 707; 58 Law Ed. 806.

The same rule is applied in the State courts.

Cragie v. Hadley, 99 N. Y. 131, 134.

Hyland v. Roe, 111 Wis. 361; 87 N. W. 252, 253.

Higgins v. Hayden, 53 Neb. 61; 73 N. W. 281, 282.

Orme v. Baker, 74 Ohio St. 337; 78 N. E. 439; 113 Am. St. Rep. 968.

#### TREASURER'S DEPOSIT TRACED.

After the close of Bank on March 14th, 1921, Mr. Stewart took the Pope & Talbot draft of \$32,897.97, deposited that day by the County Treasurer, into the United States National Bank. It was not deposited. He there surrendered it, duly endorsed, and received the warrants (R. 163, 164, 170, 171). The transaction either constituted a repurchase, by the Kelso State Bank, of these warrants, or the payment of an indebtedness with this specific money and the release of the collateral which secured the indebtedness. In either event, appellants are entitled to the warrants. If it was a purchase, then the County Treasurer's money has been traced into the proceeds of the money. If it was used to pay a debt, then the collateral securing the debt is available to the County Treasurer, and to appellants, as sureties to him. In neither event are the general creditors of the Kelso Bank injured. The deposit never became, in law, a part of the assets of the

Kelso Bank. If the County Treasurer had purchased the warrants from the Bank directly with this money, the general creditors of the Kelso Bank could not claim it. If the County Treasurer had purchased, directly, the obligation due by the Kelso Bank to the United States National Bank, the general creditors of the Kelso Bank would not have been injured, and such purchase would have carried with it the collateral, viz., the warrants.

Authorities to the effect that a cestui que trust is not entitled to a general lien upon the assets of an insolvent trustee, where such trust funds have been used to pay debts of the trustee Bank, are cases where the debts are unsecured. To hold otherwise in such case is to deplete the fund available for the general creditors of the Bank. Such is not the result here in allowing appellants the proceeds of the investment of the County Treasurer's funds.

It is well settled that, where a trust fund is used to pay a mortgage or other lien on the property of the trustee, the *cestui que trust* is given a lien on the property commensurate with the trust fund used to discharge the encumbrance.

Standish v. Babcock (N. J.), 29 Atl. 327, 329-330.

Hanna v. McLaughlin (Ind.), 63 N. E. 475, 476.

"No right is more fully recognized than the right of a *cestui que trust* to pursue and recover trust funds wrongfully diverted, provided their identity has not been lost and they have not passed into the hands of a bona fide purchaser for a valuable consideration without notice. Whenever property in its original state and form has once been impressed with the character of a trust, no subsequent change of such state and form can divest it of its trust character, so long as it is capable of clear identification; and the beneficiary of the trust may pursue and reclaim it in whatever form he may find it, unless it has passed into the possession of a bona fide purchaser without notice. Whether a disposition of trust funds be rightful or wrongful, the beneficial owner is entitled to the proceeds whatever be their form, if he can identify them.

26 R. C. L. 1348, 1349.

WARRANTS PLEDGED AS SECURITY FOR DEPOSITS OF COUNTY TREASURER IN THE KELSO STATE BANK.

The second ground upon which appellants claim the right to recover the warrants in question is based upon the fact that said warrants were pledged with the United States National Bank of Portland as security for the deposits of county funds which the County Treasurer of Cowlitz County had in the Kelso State Bank. In the opinion of the trial court, it is stated:

"The evidence is clear that the purpose of the Kelso Bank in leaving the warrants with the United States Bank was not to secure deposits of county funds already made, but in the hope that it would be able to obtain future deposits of such funds" (R. 72).

It is our contention that this statement is contrary to the evidence and is not supported by any competent evidence.

The only parties to the transaction whereby the warrants were left with the United States National Bank by the Kelso State Bank were Mr. Stewart, Cashier of the Kelso State Bank, who has disappeared, and Mr. Tucker, Vice-President of the United States National Bank of Portland. Mr. Tucker's testimony is as follows:

"When these warrants were repurchased, Mr. Stewart instructed us to place the warrants in safekeeping, in our safekeeping department, to issue a receipt for those warrants, send that receipt to the County Treasurer Brown and to call him on the long distance telephone and apprise him of that fact, which we did.

"We thought that we did send that receipt to the County Treasurer, but we have heard since that it did not arrive in his hands. By mistake, it had been sent to the Kelso State Bank" (R. 165).

"When Mr. Stewart came in he had this interview with me, and I placed the warrants in our safekeeping department, and instructed the teller in charge to issue a receipt" (R. 170).

"When Mr. Stewart came in, he stated that he had received his county funds, and was ready to retire the warrants we were holding under the repurchase agreement; he also requested us to place the warrants in safekeeping, and to telephone the County Treasurer that we were holding them for his account.

"When I stated a few moments ago, that we subsequently had no interest in these warrants, and held them for Mr. Stewart or any one he might designate, perhaps that ought to be explained. Suppose the bank had continued open, and Mr. Stewart had asked us at a later date to make some other disposition of the warrants other than that called for by the receipt which we had given, we would not have honored that request until we had been relieved of issuing the receipt to the County In other words, we would not Treasurer. have consented to any disposition of those warrants which was not approved of by the County Treasurer, or those who had succeeded to his interest" (R. 174, 175).

"Particularly referring to Plaintiff's Exhibit 5, in stating that I would not have given these warrants up because of this outstanding receipt to the Treasurer, I am saying that we assumed they were deposited under his jurisdiction; we had made an agreement to hold them, and we were going to do it. If the County Treasurer had demanded those warrants, we would have turned them over to him without any more authority from Mr. Stewart. But he never demanded them" (R. 175).

The receipt which was issued by the United States National Bank under Mr. Stewart's instructions read as follows:

"THE UNITED STATES NATIONAL BANK.
Portland, Oregon, 3/14/21.

No. 1469.

Received from Kelso State Bank.

Address: Kelso, Washington,

For safekeeping only and at your risk securities purporting to be as follows:

Cowlitz County Warrants ......33,491.59

NOT NEGOTIARLE

Held as security for deposits of county funds—County Treas., Kalama, Washington.

(Rubber Stamp) PAUL S. DICK, Cashier-Pres.

(Signed) W. R. CHOATE,

Teller" (R. 263).

And had attached thereto a list of the warrants (R. 264-276).

The receipt states that the warrants are held as security for deposits of county funds. It does not state whether it secures deposits already made or those to be made in the future, or both.

Section 5073 Remington's Code, 1915, of the State of Washington provides that the County Treasurer may accept either surety bonds, municipal, school district, county, state bonds or warrants, as security for deposits made in banks. Said section reads as follows:

"Section 5073. Bond—Approval of—Securi-

ties in Lieu of.—Before any such designation or designations shall become effectual and entitle the said treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten days after such designation or designations have been filed, file with the county clerk of such county a surety bond to such county treasurer, properly executed by some reliable surety company qualified under the laws of this state to do business therein, in the maximum amount of deposits designated by said treasurer to be carried in such bank or banks, conditioned for the prompt and faithful payment thereof on checks drawn by such treasurer, which bond much be approved by the chairman of the board of county commissioners, the prosecurting attorney and the county treasurer, or any two of such officers of said county, before being filed with the county clerk, and unless so approved the same shall not be received or filed by the county clerk; Provided, that said depositary or deporitaries may deposit with the county treasurer good and sufficient municipal, school district, county or state bonds or warrants, United States bonds, first mortgage railroad bonds listed on the New York stock exchange, or local improvement bonds or warrants whose legality have been passed upon favorably by the supreme court, or public utility bonds or warrants issued by or under the authority of

any municipality of the state for water, power or light plants or maintenance thereof upon which principal or interest is not in default at the time of such deposit, the aggregate market value of which shall not be less than the amount required in said deposit, in lieu of the surety bond herein provided for. (R. 47, 48).

Sec. 5073 Rem. Code of the State of Washington, 1915.

If, instead of depositing warrants with the United States National Bank on March 14th, 1921, the Kelso State Bank had delivered to the County Treasurer a surety bond conditioned to secure deposits in the Kelso State Bank, we believe that the courts undoubtedly would hold that the bond covered deposits already in the bank as well as deposits thereafter made. While it is true that the deposits already made did not exceed the amount of the bonds held by the County Treasurer, the same rule should be applied, in the instant case, as would be applied if the Kelso State Bank had, on the 14th day of March, 1921, delivered a surety bond in the sum of \$33,000.00 to the County Treasurer and one of the surety companies on the original bonds had become insolvent. In such case a bond conditioned to secure deposits of the County Treasurer in the Kelso State Bank, would cover deposits made before the time of its execution, as well as those made thereafter.

It is a matter of common knowledge, of which the courts will take judicial notice, that a great number of bonds are executed after the person bonded has come into possession of money or property belonging to the obligee, and, in all such cases, the bonds cover money or property received prior to their execution, as well as that received afterwards. The warrants having been pledged in lieu of a surety bond, the County Treasurer should have the same protection under the pledge that he would have had under a bond.

This transaction amounted to nothing more than pledging warrants as additional security for a prior indebtedness. It would have been just as logical for the court to have held that the warrants were pledged to cover deposits already made, thereby increasing the amount that could be deposited under the bonds, and that all future deposits were to be covered by the bonds alone, as to hold that the warrants were only to cover future deposits.

It seems clear that the intention of the parties was to have all the securities available to the County Treasurer to cover all of the deposits which he had made or might thereafter make.

The record is devoid of testimony that the warrants were pledged to secure the Treasurer as to subsequent deposits only.

The pre-existing indebtedness was a sufficient consideration to support the pledge.

31 Cyc. 795, 796. 21 R. C. L. 662.

See also:

Thomas v. Graves (Vt.), 95 Atl. 643,

in which case the pledge was given as additional security for a prior indebtedness.

Since the pledge of the warrants was for the benefit of the County Treasurer, a formal acceptance of the same was unnecessary.

26 R. C. L. 1190.

Martin v. Funk, 75 N. Y. 134; 31 Am. Rep. 446.

Rogers Locomotive Works v. Kelly, 88 N. Y. 234, 238.

Scott v. Harbeck, 49 Hun. 292, 293.

Zwietusch v. Becker, 153 Wis. 213; 140 N. W. 1056.

City of Marquette v. Wilkinson, 119 Mich. 413; 78 N. W. 474; 43 L. R. A. 840.

Beattie Manufacturing Company v. Clark, 208 Mo. 89; 106 S. W. 29, 34.

A surety may sue on a contract made for the payment of the principal's debt, although neither surety nor principal is a party to the contract.

Van Meter v. Poole, 119 Mo. App. 296; 95S. W. 960, 961.

TRUST FUNDS REMAINED AN BANK.

The County Treasurer's deposit of March 14, 1921, in the Kelso State Bank amounted to \$35, 337.57 (R. 206, 207). Of this amount \$33,491.59 was used to purchase the warrants from the United States National Bank (R. 165), and the difference, amounting to \$1,845.98 remained in the bank until it closed. The record shows the least amount of

cash in the bank after the 14th day of March, 1921, was the sum of \$17,189.32 (R. 93). Appellants are entitled to recover said sum of \$1,845.98 under their second cause of action.

26 R. C. L. 1357, 1358.

Clark Sparks & Sons v. Americus National Bank, 230 Fed. 738.

Carlson v. Kies, 75 Wash. 171; 134 Pac. 808.

Merchants Bank v. School District, 94 Fed.

705 (C. C. A. 9th Circuit).

It is respectfully submitted that the judgment of the trial court should be reversed, and a decree entered in favor of appellants.

McCamant & Thompson and
Grinstead & Laube,
Solicitors for Appellants.
Wallace McCamant and
Loren Grinstead,

Of Counsel.

# United States Circuit Court of Appeals

#### For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation.

Appellants,

VS.

Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

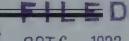
Appellees.

Upon Appeal from the United States District Court for the District of Oregon HON. R. S. BEAN, District Judge

## Brief of Appellees

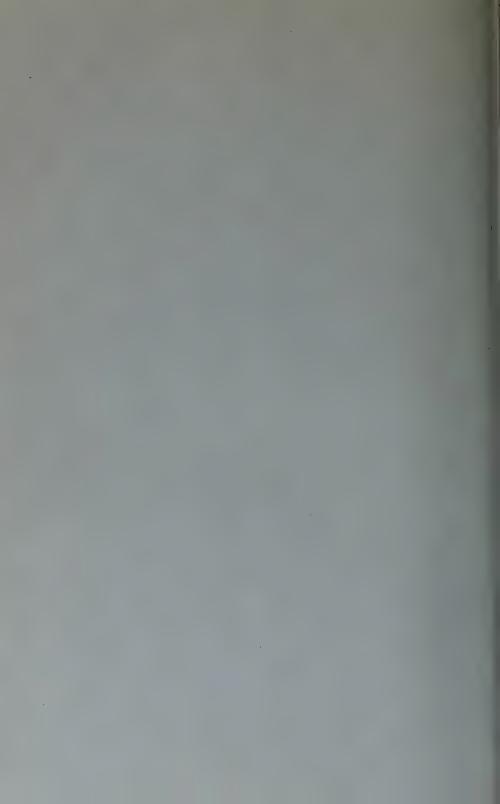
MILLER, WILKINSON & MILLER 205-208 U. S. National Bank Building Vancouver, Washington Solicitors for Appellees.

> A. L. MILLER, Vancouver, Washington, Of Counsel.



OCT 6 - 1922

F. D. MONGKTON, GLERK



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# United States Circuit Court of Appeals

#### For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation,

Appellants,

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Appellees.

No. 3920

Upon Appeal from the United States District Court for the District of Oregon HON. R. S. BEAN, District Judge

## Brief of Appellees

#### ARGUMENT

The amended complaint in this matter in effect charges that at the time the deposits in question were made the Kelso State Bank was hopelessly insolvent and that the officers of the bank knew the bank to be hopelessly insolvent and by reason of the insolvency the title to the county funds did not pass to the bank but remained in the county treasurer.

It is further charged that with the deposits made on the 14th day of March, 1921, the bank purchased the warrants in question, amounting to \$33,491.59, warrants thereby became and that the said were the property of Cowlitz County and the county treasurer became entitled to their posession; that after purchasing the warrants with county funds the warrants were left with the United States National Bank of Portland to be held by the bank as trustee for the use and benefit of the county treasurer of Cowlitz County, to secure the deposits of county funds of said Cowlitz County which said county treasurer had made in said Kelso State Bank and that the United States National Bank accepted the warrants as such trustee and agreed to hold the same for the use and benefit of the county treasurer as security for county funds of Cowlitz County theretofore deposited by said county treasurer in said Kelso State Bank.

All of these allegations are denied.

Before appellants can recover they must establish by a preponderance of the proof:

I.

That at the time the deposits were made the bank was hopelessly insolvent.

#### II.

That the bank officers at the time the deposits were received knew, or by reason of its hopelessly insolvent condition were legally chargeable with knowledge, of its insolvency.

#### III.

That the funds deposited with the county treasurer became trust funds and that with these funds the warrants in question were purchased.

#### IV.

That the deposits were made at a time when the bank was hopelessly insolvent, and known to be so by the officers, that it constituted a fraud and established a trust *ex maleficio*, and that the funds deposited under such conditions can be traced to the warrants in question.

### V.

That after the warrants were so purchased they were left with the United States National Bank of Portland to be held in trust for the use and benefit of the county treasurer of Cowlitz County as security for the county funds theretofore deposited by the treasurer in the Kelso State Bank.

Considering these matters in the order stated we would call the court's attention to the necessity of appellants establishing by a preponderance of the evi-

dence that at the time the deposits were made the Kelso State Bank was hopelessly insolvent.

To make a general deposit a trust fund by reason of the insolvent condition of the bank at the time the deposit was made it is not sufficient to show that the bank was insolvent, but it is necessary to go further and establish by a preponderance of the evidence that at the time the deposit was made the bank was hopelessly insolvent.

The evidence in this case discloses that the bank had accumulated during a long period of years a considerable amount of worthless paper and perhaps a fair inference from the proof would be that in order to save the bank from bankruptcy it would require a considerable length of time and careful management, but this does not establish hopeless insolvency.

The bank had been examined from time to time by the state banking officers and its condition had remained practically unchanged for many years prior to the time it was closed; none of the examining officers had believed that the bank was in such a condition as to warrant closing the bank; none of them believed that the bank was insolvent; certainly none of the officials believed that the bank was hopelessly insolvent. The repeated examinations and the fact that the financial condition of the bank had remained practically the same for several years and during the time of these repeated examinations, and had not been closed by the officials, is strong proof that the bank

was not hopelessly insolvent. We would call the court's attention in this connection to the fact that the bank's reserve was always above what the law required

Judge Bean in passing upon this question in his memorandum decision says:

"It is undoubtedly true, as was shown by the evidence, that the Kelso bank was in fact insolvent at the time it received the deposit in question, in the sense that it did not possess sufficient solvent and marketable assets to meet its obligations; but it was a going concern and continued to receive deposits, pay checks, and do a general banking business for three days thereafter, until forced to close by order of the banking department. Its condition at the time the deposit was made differed in no substantial way from what it had been for a long time prior thereto, and so far as I can ascertain from the evidence the officers of the bank did not know or believe at that time that the bank was hopelessly and irretrievably insolvent, but thought it would be able to continue in business."

Great weight should be given to this conclusion of the trial court based upon a question of fact. Having had the benefit of having the witnesses present in court testifying and the whole matter before him, the trial court concludes as a question of fact that this bank was not hopelessly insolvent. We think that the conclusion of the trial court upon this question is supported by the facts and circumstances in

this case and the evidence certainly falls far short of showing that at the time the deposits were made the bank was hopelessly insolvent.

In Morse on Banks and Banking, Section 629 (3rd Ed.) the author says:

"The mere fact of insolvency does not make it dishonest to receive a deposit, but hopeless insolvency does."

That seems to be the general rule followed by the authorities. It is not enough that the bank was insolvent, but hopeless insolvency must be established.

In his memorandum opinion Judge Bean quotes on this point from a decision rendered by Judge Gray in *Quinn vs. Earle*, 95 Fed., 732.

"A trader, whether a corporation or an individual, may be struggling in the straits of financial embarassment but with an honest hope of weathering the financial storm by being eventually solvent. Property received by such an individual or concern during the period of such embarrassment becomes honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions."

See also St. Louis & S. F. Ry. Co. vs. Johnston, 133 U. S., 576.

Quoting further from Judge Bean's memorandum

decision as being particularly applicable to this question:

"Banks in many instances no doubt continue to do their regular and ordinary business for long periods though in a condition of actual insolvency, and it can surely be said that such a bank is to be regarded as a trustee ex maleficio for all the deposits received in due course of its business when there is no intention of closing its doors. There is often hope, if only the credit of the bank can be kept up by continuing its ordinary business and by avoiding any act of insolvency, that affairs may take a favorable turn and thus suspension be avoided."

The record in this case will disclose the amount of deposits received for several months prior to the closing of the bank, the amount of money paid out, and the fact that there was practically no change in the financial condition of the bank. It had not suffered any new losses immediately preceding the closing of the bank, no emergency matters had arisen, the bank was continuing as it had continued for a long time prior thereto.

The appellants in order to show that the bank was insolvent have quoted some of the testimony. The part quoted has a tendency to establish that the bank was insolvent at the time the officers took charge of it, but counsel have failed to draw the distinction between insolvency and hopeless insolvency.

Judge Bean in passing upon this question indi-

cated in his opinion that the bank was insolvent but not hopelessly insolvent within the meaning of the law. The courts draw a distinction between a bank that is insolvent and one that is hopelessly insolvent.

In order to create a trust *ex maleficio* of deposits the bank must have been hopelessly and irretrievably insolvent. That is the rule given in the cases cited by appellants in their brief.

Counsel quote from 3 R. C. L. 557, where the expression is used that the bank was hopelessly insolvent, and from Bank vs. Webb, 110 U. S. 7, where the expression is used, hopelessly insolvent, and in Cragie vs. Hadley, 99 N. Y., 131, the expression is irretrievably insolvent.

A careful reading of the decisions upon this question will disclose that the courts draw this distinction.

Hopelessly is defined by the Standard Dictionary as, "affording no ground of hope; desperate"; irretrievable is defined as "not retrievable; that cannot be retrieved or restored; remediless; irreparable."

While the evidence discloses that this bank had a considerable amount of outstanding paper that was of doubtful value, assuming that the bank had continued in the ordinary course of business and had not been taken charge of by the state officials it is fair to assume from the evidence that a considerable amount of the paper would have been collected and if there had been no unusual drain upon the resources

of the bank it would have eventually been able to meet its liabilities and continue in business. What the bank will pay when thrown into the hands of the liquidating officer is not a fair criterion of the financial ability of the bank to have continued in business if it had not been thrown into bankruptcy, for it is a matter of common knowledge that forced liquidation of a bank very materially destroys its assets and prevents a realization of many accounts which would have been collected if the bank had continued in business. Certainly this bank was not destitute of hope and was not in the condition that banks usually are that are denominated and termed hopelessly and irretrievably insolvent. It had the necessary reserve on hand in cash; there was no run upon the bank; it was continuing to transact business as it had been doing for months previously, and we do not believe that counsel can find any case where deposits were made under conditions such as existed here where the courts have held that the bank was so hopelessly insolvent as to make the deposits a trust fund.

### II.

Have the appellants established by a preponderance of the evidence that the officers knew, or were legally chargeable with notice that the bank was hopelessly insolvent?

This question, like the one we have just discussed, necessitates keeping in mind the distinction between insolvency and hopeless insolvency.

From the evidence it is clear and beyond question that none of the officers connected with the bank actually knew of its embarrassed condition but the cashier: none of the other officers believed that the bank was insolvent or in any danger of insolvency. Stewart, the cashier, knew of the financial condition of the bank, but the evidence clearly indicates that he did not believe that the bank was insolvent, and certainly the evidence falls short of showing that he understood and believed that it was hopelessly insolvent. He knew that there was a large amount of paper outstanding, some of which was of doubtful value, but he firmly believed that if the bank was allowed to continue in business he would be able to collect practically all of the outstanding paper. The bank examiners who had examined the bank from time to time made no complaint of the insolvent condition of the bank to the directors. They did complain of some of the paper; there was no intimation that this paper endangered the solvency of the bank, and when the final action was taken to levy an assessment upon the stockholders it was not done with the idea that the bank was on the verge of bankruptcy, but was for the purpose of increasing the reserve and to give the bank a larger working cash capital and take the place of paper which the officials deemed worthless.

A careful reading of the transcript of record will disclose that the officers of the bank believed that the bank was financially able to continue in business.

Considering this bank in the light of the conditions which had prevailed for years prior to the time it was closed and up to the date of closing the bank, it is a fair conclusion to say that the officers of the bank had reasonable grounds for believing that the bank would be able to maintain its credit and surmount its difficulties.

On this point there can be but little doubt but that Stewart honestly believed that the bank could meet its liabilities and maintain its credit, and eventually be placed on a sound financial footing. The immediate cause for the officers taking possession of the bank was the failure of Stewart to meet the assessment levied against the stock held by him. There had been no run on the bank and no unusual drain upon its funds.

On this point we would call the court's attention to the case of *Brennan vs. Tillinghast*, 201 Fed., 609:

"However, the mere fact that the bank is known to be insolvent at the time the deposit is received is not in our opinion sufficient of itself, without more, to confer this right of rescission upon the depositor, and such right of rescission would not arise when the bank at the time of receiving the deposit, although embarrassed and insolvent, yet had reason to believe that by continuing in business it might retrieve its fortunes; the necessary condition upon which the right of rescission is predicated being that the deposit was received when the bank was hopelessly embarrassed and so circumstanced as to constitute its

receipt of the deposit a fraud upon the depositor."

"A depositor cannot recover a deposit in preference to the general creditors on the ground that it was received while the bank was insolvent if the bank was ignorant of its condition. And even though knowing its insolvency there is no reason to require the officers to disclose the state of affairs to the depositor; they may have reasonable hopes of recovery and a deposit actually received and mingled with the bank's funds passes title and the depositor takes only as a general creditor." Morse on Banks and Banking, (3rd Ed.) Section 589.

"If the officers of the bank supposed the institution would be able to maintain its credit and surmount its difficulties they were under no legal duty to the plaintiff to disclose the state of its affairs. Silence with regard to a material fact which there is no legal duty to divulge will not vitiate the contract although it eventually operates to the injury of the party from whom the fact is concealed." 27 Fed. 543.

# Quoting further from Quinn vs. Earle, supra:

"If the president and officers of the bank knew or believed that the bank was hopelessly and irretrievably insolvent at the time of receiving the deposit of the complainant, then a fraud was undoubtedly committed by the bank upon the complainant, for which there should be a remedy. But fraud must be proved, and is not to be presumed and the burden of proof is on the complainant. The mere fact that the bank

was in an embarrassed condition, by reason of the large indebtedness to it from its president, is not sufficient of itself to establish the fraud alleged in this case."

## On this question Judge Bean held:

"The evidence in this case fails to show any intent or expectation on the part of the officers to close the bank at the time the deposit was received, but rather that it would be able to continue business in the usual manner. It is undoubtedly true that Stewart, the cashier, knew of its embarrassed condition and that it had a large amount of outstanding paper which it had carried for a long time, some of which was uncollectible, and a portion of which was of doubtful value, but the evidence does not show that he knew or believed that it was hopelessly insolvent at the time; on the contrary, the evidence indicates that he honestly believed, perhaps mistakenly, that the bank would be able to maintain its credit, surmount its difficulties, and continue in business."

The proof in this case amply supports this conclusion of Judge Bean and the record does not establish that the officers knew or believed that the bank was hopelessly insolvent; neither is there sufficient in the record to legally charge the officers with such knowledge.

Appellants have cited State vs. Welty, 118 Pac. 9, a Washington decision. A reading of that case will disclose that that was a criminal proceeding based

upon a penal statute and was not intended to apply to the question now before this court.

It might be that the statute would hold the officers of a bank criminally responsible for receiving deposits at a time when the bank was insolvent, but when it becomes a question between the creditors of a bank and whether certain depositors shall have a preference over other depositors, then the rule is that before a depositor can claim such a preference he must have made his deposit at a time when the bank was so hopelessly insolvent as to constitute a fraud upon him.

If the bank was hopelessly insolvent and the officers knew it or ought to have known of it by reason of their actual knowledge of the situation of the affairs of the bank, then the deposit might become a trust fund, but knowledge of ordinary insolvency would not make a deposit a trust fund, and that is all that can be charged here against the officers of the bank, that they had knowledge that the bank was insolvent, but there was no sufficient showing that any of the officers believed that the bank was hopelessly insolvent; they all believed to the contrary and they had substantial reason for believing to the contrary.

### III.

It is contended by counsel that deposits made by the county treasurer in the bank became a special and not a general deposit. In this connection we would call the court's attention to the fact that there was an agreement entered into between the treasurer and the bank that the bank would pay two (2%) per cent. upon the daily balances. The appellant in the bond given to the treasurer assented to that arrangement and interest was paid on the daily balances up to the time the bank closed.

The deposits were made by the treasurer as other general deposits were made from time to time and were checked against by the treasurer in the usual course of business. Interest was paid on the daily balances and there was no thought in the mind of the treasurer that he was making a special deposit. There was no understanding on the part of the bank that it was receiving special deposits. It knew that the funds in the hands of the treasurer were public funds and that the treasurer was personally responsible for the funds, but that it did not alter or change the situation in any particular. The treasurer had been accustomed to keeping a large amount of money in this bank, depositing it as other money was deposited and checking against it in the usual way; it was not deposited with any understanding that the same money would be returned to the treasurer, nor was it to be used for any specially designated purpose; it was not unlawful but was directly authorized and required by the laws of the State of Washington. The statutes requiring a bond to be given by the bank and the provisions requiring the bank to pay interest on daily balances

are sections 5562-5567 of Remington's Compiled Statutes of Washington, 1922.

This matter coming from the State of Washington and the bank having been incorporated under the laws of Washington and controlled by the laws of that state, the position of the supreme court of that state upon the character of the funds deposited by the officers of the state should be of controlling force upon this court on that question.

In Kies vs. Wilkinson, 101 Wash., 344, in passing upon this question the court held:

"But as applied to insolvent banks in which deposits of public money have been made the better rule seems to be that, in the absence of statute, or a showing of facts sufficient to create a trust, a claim for public money has no preference over the claims of general creditors of the bank, but stands on the same footing with them.

\* \* While it is true that the funds deposited by respondent as county clerk of Clarke county implied a notice to the depositary that the funds were public funds and not private funds of the depositor, nevertheless the funds were deposited subject to check as an ordinary account, and, as such, constituted a general and not a special deposit."

In Kies vs. Wilkinson, supra, the supreme court of Washington cites with approval City of Sturgess vs. Meade County Bank, 161 N. W., 327. The court

will find in this case an extended discussion of this question and numerous citations of authorities.

In 5 Cyc. the rule is as follows:

"(c) DEPOSITS OF TRUSTEES, PUB-LIC OFFICERS, etc. The deposits made by trustees, executors, administrators, assignees, agents, public officers, and other persons who are serving as fiduciaries, are simply general deposits, and if the bank fails to pay them, beneficiaries have no peculiar claims or rights over other creditors. They must share like other depositors."

See also McNulta vs. West Chicago Park Commissioners, 99 Fed., 900. Among other things the court in this case said:

"A deposit upon which interest must be paid cannot be special or in trust and in case of the failure of the bank must, for the purpose of payment, be on the same footing with other deposits or unsecured claims."

## IV.

In the amended complaint the charge is made that with the funds deposited on the 14th of March, 1921, the Kelso State Bank purchased the warrants in question.

The evidence is clear and leaves the matter beyond question that the real transaction consisted in the Kelso State Bank borrowing from the United States National Bank, first the sum of \$7988.12 on the 20th day of September, 1920, and on the 6th day of December, 1920, the sum of \$26,783.76, and deposited warrants as collateral security for the loan. transaction was treated by all of the parties connected with it as a loan; interest was charged and paid upon the loans; at the expiration of the time fixed a renewal was given. The United States Bank treated it as a loan and reported it in its official reports as a loan and placed it in the loan account of the bank. The fact that the bank was given a paper which it denominated a re-purchase agreement does not alter or change the actual understanding and intention of the parties. The United States Bank held these warrants as a pledge and if the debt had not been paid could have foreclosed its pledge either by process of law, or, if the agreement was broad enough, the bank could have sold the warrants and applied the proceeds in liquidation of the debt and if there was not a sufficient sum realized from the sale it would have had a claim against the Kelso State Bank for the difference.

In passing upon this question the lower court said:

The transactions were regarded as loans by both banks; they were renewed from time to time and interest charged and paid thereon. They were carried as loans on the books of the lending bank and were so reported by it. The so-called re-purchase agreement executed by the Kelso

Bank at the time the warrants were delivered to the United States Bank were merely a convenient method of evidencing the transaction and did not change or alter the understanding and intention of the parties. When, therefore, the Kelso Bank paid the loan it simply re-possessed itself of that which belonged to it, but which had been pledged to secure the loan."

In Blake vs. State Savings Bank, 12 Wash., 619, the supreme court of Washington held that where money was deposited in an insolvent bank in the ordinary course of business and without knowledge on the part of the depositor of the insolvency of the bank, that the relation of debtor and creditor was created and that title to the money passed to the bank. It was claimed in that case that by reason of the fraud practiced by the officers of the bank in withholding from the depositor the insolvent condition of the bank that the contract of deposit between him and the bank was void and that title to the monies deposited never vested in the bank and it became a trustee ex maleficio of the fund; but the court held that the fact that the depositor became a creditor of the insolvent bank through the fraud of its officers and the bank a trustee ex maleficio gave the depositor no right to a preference over other creditors unless he could trace and recover his property.

So before appellants are entitled to the relief prayed for they must establish by a preponderance of the proof, not only that the bank was insolvent but that it was hopelessly insolvent, and they must trace and recover the property itself or its proceeds.

This is not a transaction to establish a preferred claim against the assets of the bank, it is a proceeding to recover certain specific property based upon the theory that the bank was hopelessly insolvent at the time the deposit was made, and that by reason of the fraud the bank became a trustee *ex maleficio* and that the warrants in question were purchased from the deposits made by the treasurer under these conditions.

We have called the court's attention to the failure of the appellants to establish by a preponderance of the proof that the bank was hopelessly insolvent at the time the deposit was made, but, assuming for the purpose of meeting this contention of counsel that the bank was hopelessly insolvent when it received the deposit in question, and became a trustee *ew maleficio* of the fund, have the appellants shown that they are entitled to these particular warrants?

The warrants belonged to the Kelso State Bank. They had been the property of the Kelso State Bank for several months prior to the time this deposit was made. At the time the treasurer made the deposit on the 14th day of March, 1921, he was a general depositor of the bank having to his credit a considerable sum of money. On the 14th he deposited \$35,000.00 and the amount deposited was passed to his credit and he was given a checking account for the full amount of the deposit and was thereafter

paid interest on the daily balances then on deposit. Some of these checks were taken by Stewart to the United States National Bank of Portland and placed to the credit of the Kelso State Bank. At that time the bank had a balance of some \$14,000.00, making a total credit of nearly \$50,000.00 in favor of the Kelso State Bank with the United States National Bank. Out of this balance the Portland bank took credit for the amount which the Kelso Bank was owing it and for which the warrants were held as security. No new property or securities were acquired in this transaction. It is impossible to tell what money was used in paying the debt of the Kelso State Bank. When the treasurer made his deposit so far as he was concerned the check was paid and he was given a cash credit for the amount of the check. The bank did not take the check for collection but accepted it and when taken to Portland it was used by Stewart as a matter of bookkeeping to have the bank at Portland take credit for the amount of the check, and so far as the treasurer was concerned the check was deemed collected when he made his deposit. The bank at Portland was paid the amount due it, amounting to about the sum of \$32,000.00, out of the credit it had at that time of about \$50,000.00 When the checks were delivered to the Kelso State Bank by the treasurer they became commingled with the funds of the Kelso State Bank. When taken to Portland and deposited with the United States National Bank by the Kelso Bank the amount represented by the checks be-

came commingled with the other funds then on deposit and to the credit of the Kelso Bank; and when the Portland Bank took credit for the amount due it it took credit against all of the funds then on deposit to the credit of the Kelso State Bank; the fund had become entirely commingled and there is no possible way of segregating or dividing that fund. This is a question of following the property; a question of property, and not a question of establishing an equitable right to a preference. The burden is upon the appellants to clearly establish the identity of the property and unless they have they must fail. They are not prosecuting this action based upon an equitable claim for a preference against the assets of the bank but are seeking to recover specific property upon the ground that they are the owners of it. They say the property was purchased with their money and unless they can establish that fact the court had no power to pass upon any other matter, for it is not within its jurisdiction nor within the pleadings. It is a question of identity of property, of ownership.

Upon this question we would call the court's attention to Spokane County vs. Clark, 61 Fed., 538. This case was affirmed by the circuit court of appeals in 68 Fed., 979. We desire to call the court's attention to this language from the decision of the District Judge in the case just cited:

"The statute is founded upon principles of justice and equity, and I find in the facts of this case no basis in reason for a decree requiring the

receiver to take from the other creditors their just and ratable portions of what may be left to them of the assets of this bank, in order to save Spokane County or its treasurer from loss."

We would also call the court's attention to Multnomah County vs. Oregon National Bank, 61 Fed., 912, a case where the court was passing upon the question of preference for county funds deposited in a bank that became insolvent. The court among other things said:

"His so-called right of preference, in other words, cannot in justice extend to the property of others. The theory of preference does not apply in these cases. There is no preference by reason of an unlawful conversion. The so-called right to be preferred in the case of a wrongful conversion is a right of ownership, a right of property; a right which lays hold of the property whether in its original or in a substituted form; a right which follows the property so far as it can be ascertained to be the same property or its product, and only does so because the property to be reached can be ascertained to be the same property or its product. When the means of ascertainment of the identity of property or proceeds fails the right fails."

The clearly established fact that the warrants in question were owned by the bank long prior to the time the deposit was made establishes conclusively that the proceeds of this deposit were not used for the purpose of purchasing these warrants. The most

that can be said is that some of the money was used for the purpose of paying the debt of the bank for which these warrants were held as collateral security, but that would not give appellants title to the warrants, and that is the form of action which they commenced here and it is only upon that theory that they are entitled to recover.

In addition to that we would call the court's attention to the rule that money deposited in an insolvent bank and used by it in paying its debts does not create a preference. Quoting from 195 Fed., 606:

"Moreover the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor." Citing City Bank vs. Blackmore, 75 Fed. 771; 21 C. C. A., 514.

And, quoting further from this decision:

"Again, checks of third parties deposited with a bank credited to the depositor and collected through a clearing house lay no foundation for a preferential payment, the absence of proof of the actual balance of cash the bank received on account of them, for they may have been and usually are used in whole or in part to discharge the debts of the bank."

In re: Receivership of Bank of Minnesota, 74 N. W., 136, the court held that where a number of

checks of various amounts were deposited by the city with the bank and the checks passed through the clearing house and were used in paying the debts of the bank, that although the funds were trust funds that the city was not entitled to a lien or trust in its favor on the assets in the hands of the receiver and was not a preferred creditor.

In Rugger vs. Hammond, 95 Wash., 85, the supreme court of Washington cited with approval the case of Jones vs. Chesebrough, 75 N. W., 97. The court in that case said:

"All that can be said is that a failing bank received the money and paid it out in the usual course of business to its creditors, under circumstances that show that the assets of the bank were no more at the date of the assignment than they would have been had the deposits not been made. The bank had not only used the money coming in as deposits, but had borrowed money to pay on its debts, showing a purpose to apply all money in that way, be the same more or less. While the payment of debts in that manner by a trust fund lessens the indebtedness of an insolvent estate, and may thereby increase the percentage of dividend to be declared from other funds, it does not follow that the assignee has any increase of assets because of it. It may follow that he has less debts to pay, and the estate is in that way benefitted. But such a benefit to creditors is but partial, and, if such a payment is to serve as a reason for withdrawing an equal amount from the assignee, the result is

an absolute loss to the creditors. We do not think a preference should be sustained under such conditions."

If the debts owing to the United States National Bank had passed into the hands of the liquidating officer that officer would have been authorized to pay the debt and to have received from the bank the warrants in question. That alone establishes the character of the transaction as a loan.

Assuming that the Kelso bank was indebted to the Portland bank and that the Portland bank had collateral of much greater value than the debt, clearly the liquidating officer could have paid the debt and been entitled to the security; and if in paying the debt trust funds were used the *cestui que* trust would not become the owner of the collateral security, the collateral had belonged to the bank before the deposit was made and the deposited money was simply used for paying the debt of the bank.

We will assume, as a matter of argument, that the money was wrongfully accepted by the bank at a time when the bank was hopelessly insolvent but used by it in payment of its debt. There was no new assets added, no new property brought in, the bank's debt had been paid. The theory of following property is based upon the right of property and the courts proceed upon the principle that the title has not been affected by the change made of the trust fund; but here nothing was acquired by the use of

the trust fund, it was used for the purpose of paying the debt of the bank.

### V.

The evidence upon this matter leads to the inevitable conclusion that after the debt for which the warrants were held as collateral had been paid that the warrants were left at the Portland bank with the hope on the part of Stewart that arrangements could be made with the county treasurer for securing additional deposits based upon the warrants left with the bank. The transaction was not completed, the warrants were not accepted by the county treasurer and no further action was taken relative to the warrants.

The lower court in disposing of this point said:

"The evidence is clear that the purpose of the Kelso bank in leaving the warrants with the United States Bank was not to secure deposits of county funds already made, but in the hope that it would be able to obtain future deposits of such funds."

In the amended complaint the appellants claimed ownership of these warrants based upon the allegations that the warrants were left with the bank for the use and benefit of the treasurer of Cowlitz County theretofore deposited by said treasurer in said Kelso State Bank, and they now seek to secure title to the warrants upon the theory that the transaction

created a trust in the nature of a pledge to secure the deposits for which these companies were liable.

If counsel now rely upon the allegations of the amended complaint that this arrangement was made to secure deposits theretofore made, then they are face to face with the fact that no such understanding was had; but the understanding, so far as there was any, was to the effect that the warrants were to be left for the treasurer in order that the bank might secure additional deposits. If they now rely upon the fact that they were left for the purpose of securing additional deposits they are against the fact that no additional deposits were secured on that account.

When the Portland bank was paid in full it had no further claim on these warrants. There was no obligation of any character existing between it and the Kelso bank so far as these warrants are concerned; there was no present obligation of any character between the Kelso bank and the treasurer so far as these warrants were concerned; the treasurer was under no obligations to either of the parties, no benefit could come to him and no consideration of any character moved to him by reason of the fact that the warrants were left with the Portland bank. He had security for all of the deposits he was making with the Kelso bank; he did not ask for these warrants and so far as the record stands would not have received them if they had been offered to him; he never did receive them, and it is probable that many of them,

under the law, he could not have received. The Portland bank was merely the agent of the Kelso bank in holding the warrants for the bank and the arrangement between the Portland bank and the Kelso bank had no more force than if the Kelso bank was contracting with itself. If Stewart instead of leaving the warrants with the Portland bank had taken them to Kelso and placed them in the vaults of the bank and had placed on them a memorandum stating that these warrants were to be held for the county treasurer to secure additional deposits the liability would have been the same as where the warrants were left temporarily in the custody of the Portland bank, and the fact that the Portland bank gave a receipt to the Kelso bank stating that it would hold the warrants for the treasurer as directed by Stewart did not in any manner change the legal status of these warrants.

If the treasurer had not had any security for the money deposited by him with the Kelso State Bank it could not be contended that he could have maintained an action to recover these warrants to liquidate the claim against the bank for the money deposited in the bank for he had never accepted the warrants; unless he had, the fact that they had been left with a third party for acceptance by him could not possibly give him any right over other creditors of the bank and the appellants are in no better position than the treasurer.

But the facts here are not nearly so strong as in the supposed case just cited, for here the treasurer had no money on deposit for which these warrants were left with the bank to secure him. The treasurer had no claim on these warrants; no action had been taken by him which resulted in a binding contract upon the parties. Stewart could have revoked the agency of the bank in holding the warrants any time before action had been taken by the treasurer.

There seems to be a rule in equity that where one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former a duty in the nature of a trust is thereby created.

This principle is governed by the following rule:

"To give a third party, who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him

with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promise furnishing an evidence of the intent of the latter to benefit him and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of the contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement."

In this case there was no legal obligation resting upon any of the parties. There was no consideration moving between any of the parties. Stewart was planning to have the treasurer accept these warrants so that he might get additional deposits; it was an uncompleted arrangement, never consented to or acquiesced in by the treasurer; the bank was in no sense a party to any of this transaction other than a mere custodian of the warrants. The rule stated above is taken from *Vrooman vs. Turner*, 25 Am. Rep. 195.

### In 9 Cyc., 380, the author says:

"By the weight of authority the action cannot be maintained merely because a third person will be incidentally benefited by performance of the contract; but he must be a party to the consideration, or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance."

The treasurer would not in any manner have been benefited by the performance of the contract. was not required to make any further deposit with the bank and before he did he could have demanded satisfactory security, and until some action was taken no consideration could pass to him. He was not a party to the consideration. The contract between the Portland bank and the Kelso bank was not entered into for his benefit; the fact is there was no contract, the bank became merely the agent and custodian for the Kelso bank; the treasurer had no legal or equitable interest in its performance until he had in some manner agreed to the arrangement which comprehended some future dealing and action between the parties, and under such circumstances consent on his part would have been essential before it would become a binding contract upon any of the parties.

Appellants contend that even though the transaction betwen the Kelso bank and the Portland bank constituted a loan, yet they are entitled to the securities because it is claimed that their money was used to pay the debts for which these warrants were held as collateral.

There are several reasons why this contention cannot be sustained. In the first place they have failed to establish that the bank was hopelessly insolvent at the time the deposit was made; they have failed to establish that the officers of the bank knew or are chargeable with knowledge that the bank was hope-

lessly insolvent; they have failed to trace the money that was deposited by the treasurer in the Kelso State Bank on the 14th of March, 1921; they have failed to prove that their money was used in the purchase of these warrants, at the most the evidence merely showing that some of their money was used for paying the debts of the bank.

The evidence discloses that if any of the money deposited by the treasurer was used in this connection it was for the purpose of paying the debt of the Kelso bank. Appellants did not commence this action to establish a lien for these warrants, but commenced an action alleging that they were the owners of the warrants and based their right of recovery upon the fact that their money had purchased the warrants. The payment of the debt of the bank with money deposited by them would not give them a right to these securities as against other creditors of the bank.

There is another reason why appellants cannot prevail in this matter and which we think is absolutely conclusive, and that is a law which prevails in the State of Washington that the property of an insolvent corporation is a trust fund for creditors and a voluntary preference is void. This matter was first before the court in *Thompson vs. Huron*, 4 Wash., 600, and is followed by *Conover vs. Hull*, 10 Wash., 673, and a long line of decisions until it has become a firmly settled rule in this state.

In Allen vs. Baxter, 42 Wash., 434, it was con-

tended by the appellants that the complaint was insufficient because it contained no allegation that the appellants knew that the corporation was insolvent at the time the attachment was sued out, and in passing on that point the court said:

"We think this is not necessary. If, as a matter of fact, the corporation was insolvent at the time of the levy of the writ the funds of the corporation were trust funds for the benefit of the creditors thereof."

The rule is now firmly established in Washington that an insolvent corporation in fact cannot turn over any of its property to one of its creditors which would give it a preference over the other creditors. In this case in order to give the appellants any standing at all it is necessary for them to show that at the time the transaction occurred between the Kelso State Bank and the United States National Bank in which the warrants in question were left with the bank the Kelso bank was then hopelessly insolvent. That being true, it was not then in a position to prefer one creditor to another and any assets turned over to one creditor as security for an existing debt would have been absolutely void under the decisions of the State of Washington. In the amended complaint it is alleged that these securities were left with the United States National Bank to secure the county treasurer for deposits theretofore made with the Kelso State Bank. Under the Washington decisions the relation of debtor and creditor existed between the

Kelso State Bank and the treasurer, and the Kelso State Bank was indebted to the treasurer for the amount of the deposits. If it undertook to give additional security for the debt then owing from the bank to the treasurer it would be merely giving assets to one creditor to secure him for an existing liability and would have the result of giving him a preference over the other creditors. And, indeed, that is exactly what the appellants are contending for in this case. They conted that at that time the Kelso State Bank was hopelessly insolvent and that the cashier left these warrants with the United States National Bank to be held for the treasurer as additional security for what the bank then owed the treasurer and they are now claiming by reason thereof that they are entitled to a preference over the general creditors of the insolvent bank. If additional deposits had been secured under this arrangement a different question might arise, but since nothing of that kind occurred and the only excuse for claiming these warrants is that they were intended as additional security for the deposits previously made by the treasurer, the rule given is conclusive against the right of recovery. The bank and the treasurer, the only directly interested parties, being residents of the State of Washington, the laws of Washington should be taken as controlling the interpretation of the liabilities of the respective parties under the arrangement.

### VI.

In our answer herein we pleaded as a defense that the appellants had each presented its claim for the amount of money it paid to the treasurer on account of the bonds given by the bank to the treasurer, and the record now stands that these claims were presented by these companies to the liquidating officer and approved as general claims.

The liquidating officer took charge of the bank on the 17th day of March, A. D. 1921, and these claims were presented and approved on the 25th day of April, A. D. 1921. It is also in the record that several months following the proof of these claims dividends were paid on the claims and accepted by the plaintiffs.

Counsel in their trial brief contended that these facts do not establish an estoppel. We are not basing our defense in this matter upon the ground of estoppel but upon an election of remedies. According to appellants contention they had two remedies. They could either present their claims and continue the relation of debtor and creditor, or, they could elect to present a preferred claim; or if their money or its product could be identified then they might elect to take the property. These remedies are inconsistent and they could not pursue all of them at the same time and when they have elected to pursue one they are barred from pursuing the others unless there is some circumstance which would relieve them.

In Longfellow vs. Seattle, 76 Wash., 509, the court used this language:

"For authority on the proposition that the adoption of one remedy by a person having a choice of remedies bars the right to invoke another, we need not look beyond our own cases."

Citing a number of authoritities.

In Vol. 20, page 32, C. J., the rule is given:

"As a general rule the presentation of a claim against the estate of an insolvent or of a decedent constitute such an election of remedies as will preclude the subsequent prosecution of an action or suit based on an inconsistent remedial right."

Counsel have cited as controlling in this matter. the case of Standard Oil Co. vs. Hawkins, 74 Fed., 395, and in re: Stewart, 178 Fed., 463. In the Standard Oil Co. vs. Hawkins a claim was presented and approved by the receiver in charge of an insolvent bank. The dividends were ordered paid but the claimant in this case refused to accept the dividends, and withdrew the claim.

It was stated in an action brought by the claimant that at the time the claim was allowed it had no knowledge that it had the right under the law to demand the proceeds of drafts, etc., but supposed and understood that its only right under the law was to prove its entire claim and share with others in the distribution of the funds, that the proof of the claim was prepared by the receiver upon forms furnished by

the comptroller and were executed at the request of the receiver. The deposit in this case was made just a few minutes before the bank closed. The court in that case held that the claimant had the right to withdraw its claim and to pursue the property. In the other case relied upon by counsel the plaintiff was seeking to force the trustee in bankruptcy to return to him a claim which he had presented and which the plaintiff claimed had been presented at a time when he was ignorant of the facts and of his rights, and the court held in that case that he was entitled to the withdrawal of his claim. In neither case had dividends been accepted and the facts in both cases are unlike the facts in the case now before this court.

The appellants in this case are engaged in the bonding business, furnishing securities for public officers, banks, and various other persons and institutions; there can be no question of their familiarity with matter of this kind and of their rights in bankruptcy and receivership proceedings. It is no doubt true that these companies have regular attorneys retained by the year who are capable of keeping them informed of all of their legal rights. Here it appears that the Fidelity & Deposit Company, at least, had its resident agent working in this bank; he was familiar with all of the affairs of the bank, was familiar with the warrants held by the United States National Bank, and was familiar with the deposits made from time to time by the county treasurer. The fact stands out clearly that he was as familiar with

the conditions of the bank and the business transactions as was the cashier. He was the assistant cashier working directly with Stewart. The evidence disclosed that upon the failure of the bank one of the principal general managers of these companies came to Kelso to make an investigation; he had full opportunity of investigating all of the facts connected with the bank and its dealings with the county treasurer; under their bond they were given full opportunity of investigating conditions of the bank; before they paid the treasurer they had full opportunity of making inquiry into all of the dealings between the treasurer and the bank; notwithstanding all of these facts, after having paid the treasurer the amount then owing from the bank to the treasurer they presented their general claims about a month and a third after the failure of the bank. How can they now say that they did not know that the treasurer was making these deposits, or when he was making them, when the whole matter was before them and with full opportunity of finding out every fact connected with it? And there can be no question or doubt but what they did make investigation. In this case these appellants base their claims upon an assignment from the county treasurer, their rights are in no manner superior to the rights which the treasurer had if he had no bonds and had presented his claim. The treasurer was fully informed as to when the deposits were made so we think that these plaintiffs are not in a position to plead ignorance of the facts and thereby avoid the effect of the

presentation of their general claims to the liquidating officer. In addition to that, months after the general claims were allowed and with full knowledge of the general condition of the bank and the time when the deposits were made by the treasurer, dividends were paid and were accepted by these plaintiffs. The Fidelity & Deposit Company in accepting its dividend attempted to make a reservation relieving it from its conduct. At that time this action had been commenced and it was fully informed as to all of the circumstances connected with the warrant deal.

The filing of a claim and the acceptance of dividends upon a claim are absolutely inconsistent with the claim of ownership of the warrants arising through the deposits made by the treasurer on the 14th of March, 1921. These two positions being inconsistent, this plaintiff cannot accept dividends on its general claim and at the same time endeavor to recover the property. The only basis which would excuse it from the effect of the presentation of its claim would be ignorance of the facts. How can it plead that defense here?

In Clausen vs. Head, 85 N. W., 1028, in passing on the question of election of remedies, the supreme court of Wisconsin used this language:

"Having made an election between two courses, with knowledge of the facts, he waived the one not chosen." (Citing authorities.)

Quoting further from that decision:

"The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule we have discussed, applies only where action in the first instance was taken in ignorance of the facts. (Citing authorities.) Where knowledge of the facts exists consent is conclusively presumed as a matter of law, and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time."

Having elected to accept the dividend with full knowledge of all of the facts, the plaintiffs irrevocably have bound themselves to the choice of continuing the relation of debtor and creditor.

We have been unable to find any case where dividends have been accepted on claims presented which allowed the parties thereafter to elect to pursue a different course. In both cases relied upon by counsel no dividends had been accepted and in both of those cases the claimants had withdrawn or were trying to withdraw the claims presented. In this case neither of the appellants has made any attempt to withdraw the claim; they are still relying upon their claims and have accepted the dividends upon them, and how can they claim the right to still continue to pursue two different and inconsistent remedies? Certainly before they can maintain this suit

they must abandon their claims and withdraw them, but not only have they refused to do that, but the claims are still valid and existing claims.

We contend that appellants cannot occupy these inconsistent positions and having elected to present their general claims and having accepted dividends upon them they cannot attempt to follow the property as they are trying to do in this case, and the receipt given by the Fidelity & Deposit Company at the time it accepted the dividend did not in any manner alter its legal status, for it could not change its legal election by making a reservation of that character; besides, the reservation did not cover the warrants in question.

The case of *Potts vs. Schmucker*, reported in 35 L. R. A. 392, we think is conclusive of this question and is the only decision we have been able to find which covers the facts as they have been disclosed in this case. Quoting from that decision, the court says:

"While it is true that a bank which, being insolvent and knowing it, takes funds on deposit thereby commits a gross fraud on the depositors, yet it becomes the duty of the depositor to elect whether he will repudiate the transaction and reclaim the money deposited, or affirming permit the relation of debtor and creditor between him and the bank to stand undisturbed.

"The relation between a bank and its creditors is that of debtor and creditor, and if a fraud has been perpetrated by the bank in accepting the

deposit, the depositor may rescind the contractual relation and recover back the money; but if he affirms the contract, he surrenders his right of rescission. Now all of these depositors have proved their claims in the insolvent proceedings and taken their dividends. They have consequently elected to adhere to the contract and it is too late to rescind it now."

#### VII.

There is one other subject that we desire to call to the court's attention and that is the contention of the appellants that they are entitled to a preference over the other creditors because at the time the deposits were made the bank was hopelessly insolvent. It appears from the record that the bank had been in practically the same condition for a long time preceding the 17th of March, 1921; during the several months preceding the 17th of March, 1921, a large amount of deposits were made, running into several hundred thousand dollars; these depositors would have the same right of preference that these appellants claim; if appellants are entitled to preference then practically all of the other creditors are entitled to preference and they have the same right to claim it that these appellants have, for these appellants so far have not made claim to a preference to the liquidating officer. This being a court of equity these matters should be taken into consideration and if one creditor is entitled to a preference then all of the other creditors who are in the same position are entitled to share with these creditors.

In closing we would call the court's attention to the fact that these appellants were compensated sureties, that their dealings with the bank grew out of a contract for which they were being compensated. The rule now seems to be that a compensated surety is not entitled to any more favors than ordinary persons or corporations.

Here were these appellants, getting a consideration for their undertaking, to now permit them to be paid in full while the other creditors who occupy similar positions can only be paid in part would be inequitable and unfair under the facts disclosed in this case, and we feel that before a preference should be allowed of the character claimed in this case in a court of equity that the conditions warranting it should be absolutely clear and beyond any question of legal dispute. There is no reason in equity why Cowlitz County or the treasurer of Cowlitz County, or the bonding companies should be paid in full and the other general creditors suffer heavy losses, for they were all general depositors and the deposits were made under like conditions and were general checking accounts.

We therefore submit that the appellants should be denied any claim to the warrants in question and that the judgment of the District Court should be affirmed.

Respectfully submitted,

MILLER, WILKINSON & MILLER, Solicitors for Appellee.

A. L. Miller,

Of Counsel.



# United States (Circuit Court of Appeals

For The Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation.

Appellants,

VS.

Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON HON. R. S. BEAN, District Judge.

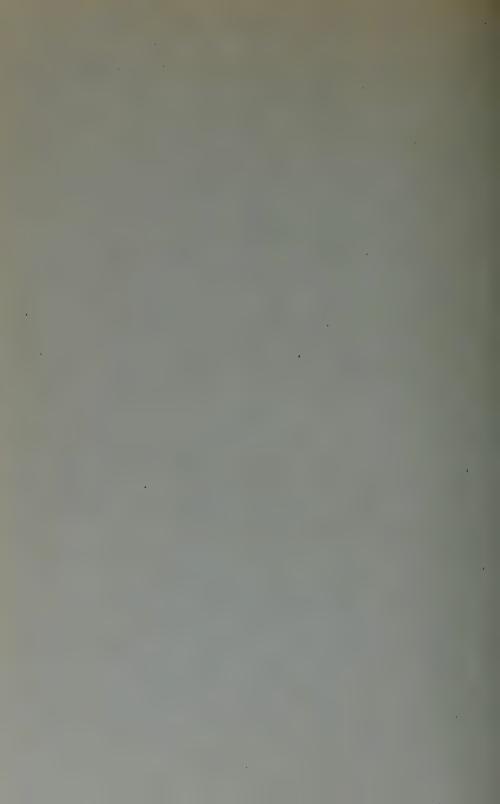
### APPELLANTS' REPLY BRIEF

McCamant & Thompson,
Northwestern Bank Bldg., Portland, Ore., and
GRINSTEAD & LAUBE,
314 Colman Bldg., Seattle, Washington,
Solicitors for Appellants.
Wallace McCamant, Portland, Oregon, and
Loren Grinstead, Seattle, Washington,
Of Counsel.

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# United States Circuit Court of Appeals

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FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation, Appellants,

VS.

Kelso State Bank, an Insolvent Banking Corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the Kelso State Bank, Appellees.

No. 3920.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. R. S. BEAN, District Judge.

### APPELLANTS' REPLY BRIEF

Appellees have served their brief in the above case. This brief contains many statements relative to evidence but does not contain a single reference to the pages of the record in support of the statements made. We desire to call the court's attention to the following provisions of Rule 24:

- "2. This brief (appellants') shall contain in the order here stated—
  - (c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.
  - 3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief \* \* \*. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.
  - 5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court."

Rule 24, U. S. Cir. Ct. of App. 9th Cir. 231 Fed. vi.

We believe the court should enforce the above rule in the instant case and refuse to consider the brief of the appellees or to hear counsel for appellees on oral argument.

The brief filed by the appellees contains many

statements which are not supported by the evidence, but, because there is no reference made to the pages of the record, it is impossible to turn to any particular page to find out whether there is any testimony which might support the claim made by the appellees. For example, on page 12 of their brief the appellees state that "none of the officers connected with the bank knew of its embarrassed condition but the Cashier." On pages 40 and 41 of said brief the statement is made that the Assistant Cashier "was as familiar with the condition of the bank and the business transaction as was the Cashier." Neither of these statements is supported by any reference to the record, but it is apparent that one of them is in error.

Should the court consider appellees' brief, the following is offered in reply to such points as are not covered in appellants' opening brief.

The argument on page 32 of Appellees' brief to the effect that the contract of pledge was not completed is answered on page 41 of Appellants' brief.

The uncontradicted evidence is that the warrants were delivered and that the pledgor could not have recovered them without obtaining a release from the County Treasurer. (R. 174, 175).

The control and dominion of the pledged property had passed from the pledger into the absolute control and dominion of the pledgee, which is the test of a pledge.

Hastings v. Lincoln Trust Co., 115 Wash. 492; 197 Pac. 627.

On pages 35 and 36 of their brief, appellees argue that appellants should not recover the warrants on the theory that they were pledged to secure a past indebtedness, as that would be allowing a preference contrary to the decisions of the Supreme Court of the State of Washington. The contract of pledge was made in the State of Oregon (R. 163-166). Its validity must be determined by the laws of the place where made.

13 C. J. 248, 253.

Jamieson v. Potts, 55 Ore. 292, 300; 105 Pac. 93; 25 L. R. A. (N. S.) 24.

The trust fund doctrine, as applicable to the assets of a corporation which is a going concern, does not obtain in the State of Oregon and a corporation in the State of Oregon may prefer one creditor over another.

Garetson-Hilton Lumber Co. v. Hinson, 69 Oregon 605; 140 Pac. 633, and cases cited therein.

See also:

Peoples Bank v. Rostad, 86 Ore. 695, 702; 169 Pac. 347, 349.

On pages 38 to 45 of their brief, appellees make some argument that appellants, by presenting claims, made an election of remedies. When the claims were presented, the appellants' agent, who presented the same, did not know when the deposits had been made or the condition of the bank at the time the deposits were made, and made no investigation, except as to the amount on deposit by the

County Treasurer. (R. 193, 194). He knew nothing of the warrants. (R. 195). Such being the case, he could not and did not know that there was any possibility that appellants had any other remedy than to present their claims to the officer liquidating the bank. Not knowing anything about the warrants, he could not have known that the moneys deposited by the County Treasurer had been used in repurchasing the same; and, regardless of the circumstances under which the deposit was made, unless appellants knew what had become of the money, they would not know that there was any chance of tracing the same.

The law relative to election of remedies is stated in *Corpus Juris* as follows:

"In order to constitute a binding election the party must, at the time the election is alleged to have been made, have had knowledge of the facts from which the coexisting, inconsistent remedial rights arise, since any position taken by a party before knowing all of the facts should be classed as a mistake and not as an election. If a party acts in ignorance of material facts, he may, when informed, adopt a different remedy, even though inconsistent, unless of course, the rights of innocent persons have intervened; \* \* \*."

20 C. J. 35, 36.

"An election between two remedies necessarily implies knowledge that there are two remedies, and in the absence of circumstances

constituting an estoppel, an election made by a party under a statement of facts, or a misconception as to his rights, is not binding in equity, and this is true whether the mistake is one of law or one of fact."

20 C. J. 37.

The precise question presented in this case was decided contrary to the contention of the appellees in the following cases:

Standard Oil Co. v. Hawkins, 74 Fed. 395. Graybill v. Corlett (Colo.), 154 Pac. 730. In re Stewart, 178 Fed. 463, 468.

On pages 40 and 41 of their brief, appellees argue that the Assistant Cashier of the Kelso State Bank was an agent of the appellants and that his knowledge was the knowledge of the appellants. argument is not sound for several reasons. Assistant Cashier was not an agent of the appellants or either of them. He was only a local agent of Hansen and Rowland, agents for appellants. He merely solicited business for appellants' agent and had no authority to act in connection with the investigation of claims, the presentation of claims, or making settlement of claims. (R. 195, 196). Furthermore, he did not act or purport to act as agent for appellants or for Hansen & Rowland in connection with the investigation of this case or the presentation of claims. He did not talk to appellants' agent about the failure of the Kelso State

Bank until several months afterwards, and then did not give any information which would have advised appellants or their agent of the facts upon which the present action is based. (R. 194). Being Assistant Cashier of the bank which had failed, he was acting for the bank and not for appellants, and it is clear that the appellants can not be charged with any knowledge which he possessed, unless the same was communicated to them. Furthermore, there is no evidence that he knew anything about the warrants having been repurchased with money deposited by the County Treasurer, or that the deposits could be traced.

There is no evidence that the County Treasurer knew, prior to the time his claim was paid and he made the assignment to appellants, or at any other time prior to the trial, that the warrants in question had been repurchased with moneys deposited by him after the bank was hopelessly insolvent, or that he ever knew that the bank was hopelessly insolvent when his deposits were made.

The dividend accepted by the Maryland Casualty Company was accepted prior to the commencement of this action, by the agent who had presented the claims, and neither said agent or the Maryland Casualty Company had any knowledge at that time in addition to the knowledge they had when the claim was presented. The dividend of the Fidelity & Deposit Company was turned over by the Super-

visor of Banking with the express understanding that the accepting of the same should not prejudice said appellant in the present action. (R. 276, 278).

Respectfully submitted,
McCAMANT & THOMPSON,
GRINSTEAD & LAUBE,
Solicitors for Appellants.

WALLACE McCAMANT and LOREN GRINSTEAD,

Of Counsel.

# In The United States Circuit Court of Appeals

For The Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, and MARYLAND CASUALTY COMPANY, a corporation,

Appellants,

VS.

Kelso State Bank, an insolvent banking corporation, and John P. Duke, as Supervisor of Banking of the State of Washington, in charge of and liquidating the assets of the Kelso State Bank,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON HON. R. S. BEAN, District Judge.

### APPELLANTS' PETITION FOR REHEARING

McCamant & Thompson,
Northwestern Bank Bldg., Portland, Ore., and
GRINSTEAD, LAUBE & LAUGHLIN,
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Solicitors for Petitioners.

WALLACE MCCAMANT, Portland, Oregon and LOREN GRINSTEAD, Seattle, Washington, Of Counsel.



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Appellants,

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Appellees.

No. 3920

Upon Appeal From the United States District Court for the District of Oregon Hon. R. S. Bean, District Judge.

## APPELLANTS' PETITION FOR REHEARING

### PETITION FOR REHEARING

Appelants earnestly request a rehearing herein. Properly to hold with the appellees, this court must have found:

(1) That the County Treasurer's deposit

was validly received without knowledge of the Bank's officers of its insolvency; or

- (2) That the moneys so deposited by the Treasurer were no traced into the warrants; and
- (3) That the warrants were not pledged as collateral to secure the County Treasurer's deposits generally.

Upon the first point, relative to the knowledge of the Bank's officers of its admitted condition of insolvency at the time the deposit was received, the majority opinion quotes conclusions testified to by the Assistant Cashier (who could hardly be expected to admit criminal knowledge), and entirely ignores the pregnant facts. For instance, prior to receiving the deposit of March 14th, the Bank's President, Cashier and Assistant Cashier knew (but the Bank Commissioner, quoted in the majority opinion, did not yet know) that the sole remaining chance of averting disaster had disappeared (Exs. 19, 21). Surely this testimony is more potent than guarded expressions of conclusions made by the Assistant Cashier at the time of trial.

The majority opinion also holds that the Cashier's knowledge is not imputable to the Bank. We respectfully insist that such is not the law as laid down either in logic or in precedent but, assuming it to be correct, what about the knowledge of Mr. Carothers, the President, and Mr. Plamonden, the Assistant Cashier? Both of them knew, before they retired on the night of the 13th, that the last possi-

bility under which the Bank could continue had ceased to exist, and the Assistant Cashier, expressing the views of the President and himself (Plamonden is the son-in-law of Carothers) had written for the Bank Commissioner to come "the sooner the better."

Upon the second point, the majority opinion assumes that the Pope & Talbot draft was deposited as a general deposit in the United States National Bank, and asserts a failure to trace the County moneys into the warrants in question. Absolutely undisputed is the evidence to the contrary. The sole evidence is that the Pope & Talbot draft was taken to the note teller and there surrendered in redemption or repurchase of the warrants. This testimony is confirmed by the rubber stamp impression upon the check in evidence. The Pope & Talbot draft was never deposited or purported to be deposited in the Kelso Bank's account in the Portland Bank, nor was there any evidence that such conduct was intended.

The majority opinion concludes that the transaction between the two banks was a loan upon security of the warrants. What difference does it make to so construe the repurchase agreement? In either event, the Portland Bank held the warrants rightfully until it received a sum of money. It did receive it, in the Pope & Talbot draft. That deposit of the County Treasurer, being traced, entitles the Treasurer to all the rights of the Portland Bank, whether they be a title or lien in and to the war-

rants. The majority opinion augments the estate of the insolvent Bank by the fraudulent receipt of the deposit of the County Treasurer.

Upon the third point, the deposit of the warrants as collateral to indemnify the County Treasurer is dismissed, in the majority opinion, by a reference to the trial court's comment that the purpose of giving this collateral was to procure further deposits by the County Treasurer. The *sole* evidence is that of Mr. Tucker, to the effect that Mr. Stewart directed that the warrants be deposited in the Portland Bank's safe-keeping department as collateral security to the County Treasurer; and the receipt as issued by the U. S. National Bank.

We respectfully urge that, under these circumstances, the majority opinion is entirely unsatisfactory as a legal answer to the questions propounded.

As grounds for reconsideration, therefore, we urge:

I.

That the court has misconstrued the evidence and misapplied the law relative to the knowledge of the Bank's officers of its existing insolvency at the time of the County Treasurer's deposit.

II.

That the court has erred in holding that knowledge of the Cashier is not imputable to the Bank and has ignored the undisputed evidence that the President and Cashier, at the time of the deposit in question, knew positively of its hopeless condition.

#### III.

The court has erred in holding that the County Treasurer's deposit was not traced into the payment which released the warrants from the United States National Bank and, so failing, has misapplied the law.

#### IV.

The court has erred in ignoring the legal effect of the collateral receipt given by the United States National Bank and the deposit of the warrants with it, as security to the County Treasurer.

#### I.

### KNOWLEDGE OF INSOLVENCY

On the night of March 13th, 1921, after the previous conferences and efforts to resuscitate the Bank, there met at the Bank at Kelso, Mr. Carothers, its President, Mr. Stewart, its Cashier, Mr. Plamonden, its Assistant Cashier, and Mr. L. N. Plamonden, the banker from Woodland. The purpose of that meeting was to ascertain whether it was possible to save the Bank. The two Plamondens were desirous of acquiring the Bank and financially able to do so but, in the early morning hours, before adjourning, they wrote to the Bank Commissioner the letter (Pltff's. Ex. No. 19) showing, not that it was impossible for them to acquire the Bank, but that the Bank's condition was such that no sensible person would undertake its resuscitation. Also Mr. George Plamonden wrote (Pltff's. Ex. 21) the Bank Commissioner that Carothers, his brother and himself, were agreed on the Bank's condition. When, therefore, subsequently the Treasurer's deposit was received, the President and the Assistant Cashier already knew of the Bank's condition and the Bank Commissioner had been summoned. They were merely waiting for him to take charge, instead of taking the responsibility of closing the doors themselves. It matters not what actual or ostensible mental attitude Mr. Stewart had; the conduct and utterances of the parties at the time are more potent than George Plamonden's subsequent conclusions on the witness stand made with the criminal statutes staring him in the face and cited in the majority opinion.

Mr. Plamonden's testimony, however, was not confined to the isolated expression of opinion cited in the majority opinion. He said (R. p. 146):

"That examination which we made showed that, in our estimation, there was a great deal of objectionable paper among the bills receivable of Kelso State Bank. We figured that there was somewhere around one hundred thousand dollars worth of paper that it was very questionable if collections could be made upon. We figured that there was something a little over one hundred thousand dollars that we figured would be paid, but that was most probably slow. In our estimation we considered it to be good, but we considered it to be slow. But of the parties who participated in that examina-

tion, we did not all agree in these conclusions. Mr. Stewart objected quite strenuously to a great many of our ideas. A large part of the paper that we thought was worthless in our opinion, Mr. Stewart insisted that in his opinion would eventually be paid. It was largely a matter then of a difference of opinion. Mr. Carothers, I think, coincided with my brother and myself in those opinions; he thought there was one hundred thousand dollars of uncollectible paper."

The above quotation shows that the only officer of the Bank who even claimed to believe the Bank was solvent was the Cashier. The President of the Bank, the Assistant Cashier and the latter's brother, who was a banker at Woodland, believed there was at least one hundred thousand (\$100,000.00) dollars of uncollectible paper in the bank and another one hundred thousand (\$100,000.00) dollars of slow and doubtful paper. The subsequent facts showed that this belief was well founded, and it is submitted that the President and the Assistant Cashier of the Bank had no right to keep the Bank open and receive deposits when they believed that it was in the condition stated.

The majority opinion cites Plamonden as testifying that Stewart said, "We would come out all right." The opinion clearly infers that this was Stewart's opinion on the night of the 13th, after the examination was concluded. The record shows nothing of the sort. Plamonden testified, in sub-

stance, that, about a week or ten days before the Bank closed, Stewart came into the Bank looking so worried that he went back to Stewart at his desk and asked him, if the worst came to the worst, whether he was going to do anything rash. then that he testified that Stewart said. "Everything would come out all right." (R. pp. 147-150). This not only completely nullifies the force of that statement, as used in the majority opinion, but it also shows that Mr. Plamonden and Mr. Stewart, at that time, a week or ten days before, were mentally facing the problem of the Bank's impending failure, to the extent of discussing possible suicide. Brave words then uttered to build up false hopes or to avert suspicion have little potency as evidence of Stewart's true state of mind. Of far more probative value is Plamonden's mere statement that he saw that Stewart looked worried, to the extent that he thought it advisable to go back and try, if possible, to avert his suicide.

Let us not be diverted, however, from the fact that all of this occurred a week or ten days before the final decision on the last hope of averting disaster. Let us not forget that the knowledge that the Bank must fail was not solely Stewart's, but also Carother's and Plamonden's, and this was prior to the Treasurer's deposit of the 14th.

Even the Bank Commissioner, at the Chehalis meeting of March 6th, knew and stated that the Bank must close unless a one hundred per cent. assessment were levied and paid. He testified that,

when he found that the stockholders were unable to meet the assessment, he concluded to close the Bank (R. p. 134).

Further, relative to the examination of March 13th, he testified:

"It was not entirely for the purpose of getting hold of Stewart's interest that this examination was made; it was a question of saving the Bank or preventing the closing of it." (R. p. 130-131).

Mr. Minchull, a Deputy Bank Examiner, testified to telling Stewart, in November, 1920, that he was "kidding" himself as to the value of the Bank's assets (R. p. 136). He further testified that, at the Chehalis meeting on March 6th, 1921, after Mr. Hay had advised the officers present that it was necessary to levy an assessment of one hundred per cent., Mr. Marsh, a director of the Bank, remarked, "that it would take all of that, or to the effect that there would not be enough." (R. p. 136). Between that date and March 13th, it had been determined that the one hundred per cent. assessment could not be collected. Under these circumstances, Mr. Marsh also knew, prior to March 14th, that the Bank could not survive.

What substantial justification, therefore, is there to rest the majority opinion on Mr. Plamonden's testimony that Mr. Stewart expressed himself optimistically? It does not prove that he was talking his convictions or knowledge, nor does it prove that the other officers, Carothers, Plamonden and Marsh

were of the same mind. In fact, the testimony is the other way and George Plamonden's letter of March 14th had summoned the Bank Commissioner (Pltff's. Ex. 21) to come "the sooner the better." What could it avail, unless the Commissioner closed the Bank (which he did)? Why the haste, unless it was to avert criminal responsibility?

Let us be candid. Assuming that every one connected with it knew that the Bank was hopelessly insolvent and bearing in mind Mr. Stewart's disappearance and probable suicide and the criminal statutes applicable to the other officers, just what would you expect us to be able to get by way of evidence that is not in this record? Do you expect us to have Mr. Carothers take the stand and testify that he left the Bank open after he had definitely determined that it was criminal to leave it open? Do you expect George Plamonden to take the stand and testify that the Bank remained open after he knew that it was hopelessly insolvent? Do not their acts. conversations and correspondence, at the time, show their feeling in the matter? Does not George Plamonden's letter show an intense desire on his part to have the Bank Commissioner take the responsibility? The letter states that his letter reflects Mr. Carother's views as well, and he wanted the Bank Commissioner there "the sooner the better."

Men engaged in crime are not accompanied by brass bands. George Plamonden's letter, however, supplementing his brother's report, is about as striking.

The facts in the cases cited in the majority opinion as supporting the conclusion reached are entirely different from the facts in the instant case.

The distinction betwen the case of *Quinn vs. Earl*, 95 Fed. 728, and this case is so clearly pointed out in the dissenting opinion herein and in the appellants' brief that further comment is unnecessary.

In the case of *Brennan vs. Tillinghast*, 201 Fed. 609, Brennan had borrowed \$1,000.00 from the bank on February 1st, 1909, executing his promissory note, payable in four months. On April 8th, 1909, he deposited \$1,000.00 in the bank with the understanding that it was to be used in paying his note at maturity. On June 14th, 1909, he gave up his original intention of paying his note, paid the interest then due and gave a renewal note. The bank closed on June 21st, 1909. The court, in holding that he could not recover the \$1,000.00, said:

"In the present case it merely appears that the bank was insolvent at the time this deposit was received, and had been known to be insolvent for ten years previously by the cashier who received the deposit. The extent of its insolvency at that time is not shown, nor is there any evidence as to what subsequent events precipitated the condition which caused its doors to close, or whether or not at the time the deposit was received the bank, although embarrassed and insolvent, yet had reasonable

hopes that by continuing in business it might retrieve its fortunes, just as it had previously continued in business for the ten preceding years during which it had been insolvent. In the light of this meager evidence, we agree in the view expressed by Judge Denison, then district judge, who heard this case below, who said:

'There is no reason to think in this case that the suspension of the bank was any more imminent on April 8th than it had been for a long time, or that the cashier or bank officers anticipated the closing of the bank or had any expectation that complainant would not receive his money when he should ask for it-except their general and vague fear that they might fail to tide over their difficulties. This does not seem to me to raise the necessary trust. Complainant's own showing is that for more than 60 days the deposit would have been repaid on demand, and that it was practically offered to complainant when the note was renewed. For these reasons, I think complainant is not entitled to any preference upon his certificate of deposit, but should prove the same as a general creditor.'

And, whatever would have been the result otherwise, we think it cannot properly be held that the receipt of this particular deposit constituted a fraud upon Brennan within the rule entitling him to follow it as a trust fund, in the light of the undisputed facts, shown by his own testimony that at the time the deposit was made the bank held his \$1,000 note for borrowed money, and the deposit was made with the "understanding" that it would be used in payment of this note at maturity. As this deposit was hence, under this evidence, in effect taken by the bank as quasi security for the payment of a just debt due to itself, this circumstance alone, in our opinion, relieves the bank from imputation of fraud in receiving the deposit, which might otherwise have existed if the deposit had been merely received in the ordinary course of dealings between the bank and a customer not indebted to it."

In the case of Williams vs. Van Norden Trust Co., 93 N. Y. S. 821, the inventory and schedule filed after the assignment showed:

Debts and Liabilities	\$54,497.81
Assets nominally worth	55,850.77
Assets actually worth	51,500.43
Deficiency	2,997.38

The testimony was that the firm was not in fact insolvent when the assignment was made and that the assets would have exceeded the liabilities if they had been properly handled.

In the case of *Furber vs. Dane*, 204 Mass. 412, the court stated that there was nothing to show that the members of the firm knew it was insolvent at the time of the transaction.

#### II.

STEWART'S KNOWLEDGE IMPUTABLE TO BANK. The majority opinion states:

"Nor was his (Stewart's) knowledge of his own mismanagement imputable to the officers of the Bank."

While Stewart's misjudgment, mismanagement and possible fraudulent conduct may be said to be the reason for it, the vital question is whether the Bank, at the time the deposit was received, had knowledge of its own insolvent condition. The knowledge of the officers is the knowledge of the Bank. We have already pointed out herein that the other officers and a director knew and appreciated its insolvent condition. However, Stewart's knowledge is imputable to the Bank.

He knew that, if the Bank was to continue, it was necessary for him to raise over ninety thousand dollars immediately (Ex. 19). He knew that he had defrauded the Bank of over fifty-five thousand dollars, an amount exceeding the sum of its capital and surplus (R. 107-8). He knew his own financial condition, which was that of absolute insolvency (R. 103). He therefore knew that he could not raise that which he must raise in order that the Bank should continue.

In support of their opinion, the majority cite *Perth-Amboy Gas Light Co. vs. Middlesex County Bank*, 60 N. J. Eq. 34, and quote from that decision as follows:

"Of course, it almost goes without saying

that the facts that the Cashier knew for months that the Bank was insolvent is not notice to the other officers of the Bank. It might as well be argued that the owner of a chattel, which has been stealthily stolen from him by his employee, is chargeable with notice of such theft and estopped from asserting his title to the stolen chattel when found."

In that case, the Cashier was not the managing officer; did not receive the deposit under consideration, but had previously absconded. In our case, appellees stressed the extent of Mr. Stewart's absolute control as managing officer of the Bank. He personally received the deposit and personally utilized the Pope & Talbot draft, received from the County Treasurer, at the Portland Bank. All transactions between the Kelso Bank and the County Treasurer and all transactions in question between the Kelso Bank and the Portland Bank were conducted by Mr. Stewart. In the transaction in question, Mr. Stewart was not engaged in defrauding the Bank which he managed, nor was he acting adversely to its interests. On the other hand, the transactions were for the benefit of the Bank and augmented its assets.

The cases holding that a bank or other corporation is not charged with the knowledge of its officer as to transactions in which the officer is acting adversely to its interest are not in point. This case is clearly within the rule that, when an officer, acting for or representing a corporation, is dealing with a third person, all of the knowledge which the officer has, regardless of how he acquired such knowledge, is chargeable to the corporation.

This distinction is clearly pointed out in *Pennington vs. The Third National Bank of Columbus* (Va.), 77 S. E. 455, 45 L. R. A. (N. S.) 781. We quote from that case as follows:

"The concrete proposition, upon the correct solution of which the decision must rest, involves the relation between a bank and its customer with respect to a deposit made by the latter in the following circumstances: At the time the cashier of the Bank of Tarboro received the draft in question for collection, and made the collection, he knew that the bank was hopelessly insolvent; but the depositor and the other officers of the bank had no knowledge of its insolvent condition. And the insolvency of the bank was due to the defalcations of the cashier and assistant cashier.

"The authorities are agreed that when a bank, with knowledge of its insolvency, receives a deposit, it perpetrates a fraud on the customer, and is held to be a constructive trustee of the deposit, and the depositor may recover of the receiver the deposit, if it can be identified, or its equivalent, if it cannot be identified, when the customer's money has been mingled with the bank's funds, which, to an amount equal to the deposit, has gone into the hands of its receiver. Western German Bank

vs. Norvell, 69 C. C. A. 330, 134 Fed. 724; Tiffany, Banks and Bkg., Sec. 89, p. 349, and cases cited in notes.

"The correctness of the general principle is conceded; but it is said that this case falls within the exception to the doctrine of imputed knowledge (which doctrine is founded upon the presumption that an agent discloses his knowledge to his principal), because the fact that the insolvency of the bank was due to the defalcation of the cashier repels the presumption that he imparted the knowledge to the bank. Baker vs. Berry Hill Mineral Springs Co., 112 Va. 280—L. R. A. (N. S.)—71 S. E. 626.

"We cannot agree that this case is controlled by the foregoing exception. The defalcations of the cashier and his assistant which caused the insolvency of the bank, occurred prior to the receipt and collection of the draft in question; and the transaction was not between him and the bank, but between him, acting for and representing the bank as its executive officer. and the bank's customer, the Georgia bank. Throughout the transaction, the cashier was acting for, and as the sole representative of, the bank, and in the line and within the scope of the powers and duties of his office with respect to the matter in hand; and therefore his knowledge of the insolvency of the bank (though brought about by his antecedent misconduct) was its knowledge. In other words, the insolvency of the bank was a condition within the knowledge of its executive officer; and it matters not, so far as the rights of innocent third persons dealing with the bank through him are concerned, how he first acquired knowledge of that condition. First Nat. Bank vs. Richmond Electric Co., 106 Va. 347, 7 L. R. A. (N. S.) 744, 117 Am. St. Rep. 1014, 56 S. E. 152; Atlantic Trust & S. D. Co. vs. Union Trust & Title Co., 111 Va. 574, 579, 69 S. E. 975; Wade, Notice, 2d Ed. Secs. 683a, 683b: Cook vs. American Tubing & Webbing Co., 28 R. I. 41, 9 L. R. A. (N. S.) 193, 211, 65 Atl. 641; Morris vs. Georgia, Loan Sav. & Bkg. Co., 109 Ga. 12, 46 L. R. A. 506, 34 S. E. 378; Bank of United States vs. Davis, 2 Hill 451; Holden vs. New York & E. Bank, 72 N. Y. 286; Le Duc vs. Moore, 111 N. C. 516, 15 S. E. 888; St. Louis & S. F. R. Co. vs. Johnston, 133 U. S. 576, 33 L. Ed. 686, 10 Sup. Ct. Rep. 390; Atlantic Cotton Mills vs. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496.

"In *Le Duc vs. Moore*, 111 N. C. 516, 15 S. E. 888, in an action by the receiver of a bank on a promissory note against the maker and payee, the latter being the president of the bank, to which he transferred the note by indorsement, the president and cashier constituted the discount committee and discounted the note. Held, that the bank took the note subject to equities

existing in favor of the maker at the time of the indorsement.

"In St. Louis & S. F. R. Co. vs. Johnston, 133 U. S. 576, 33 L. Ed. 686, 10 Sup. Ct. Rep. 390, the bank became insolvent by the operations of a firm of which the president of the bank was a member. A draft was deposited in the bank for collection. Held, that the knowledge of the president of the bank's insolvency, though occasioned by his firm, was the knowledge of the bank.

"In the leading case of Atlantic Cotton Mills vs. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496, Gray was the common treasurer of two corporations; and, in order to make good his deficit in one of the crporations, he drew checks upon the other pavable to the order of the first, by which the money was drawn and used; no other officer of either corporation knowing the facts. A similar contention was made in that case as in this—that knowledge of the officer could not be imputed to the corporation. But the court, at page 273, says: 'It is true that no officer of the plaintiff, besides Gray, knew of the fraudulent origin of these checks; but, in the very transaction of receiving them, the plaintiff was represented by Gray, and by him alone, and is bound by his knowledge. It is the same as if the plaintiff's directors had received the checks, knowing what he knew.

For the purpose of accepting the checks, Gray stood in the place of the plaintiff, and was the plaintiff. It is quite immaterial, in reference to this question, in what manner or by what officers of the corporation the funds were afterwards used.'

"In the course of the same opinion, at page 276 of 147 Mass., Judge Allen observes: 'We have preferred to put the decision of this point upon the broad ground that, if the treasurer of a corporation is a defaulter, and his defalcation is as yet unknown and unsuspected, and he steals money from a third person, and places it with the funds of the corporation in order to conceal and make good his defalcation, and the corporation uses the money as its own, no other officer knowing any of the facts, the corporation does not thereby acquire a good title to the money as against the true owner, but the latter may maintain an action against the corporation to recover back the same.'"

The foregoing rule is recognized in the *Perth-Amboy G. L. Co.* case, relied on by the majority opinion. In that case, the court stated the rule to be that the depositor, in order to recover, must show that the officers of the bank who transacted the business with him, knew of the insolvent condition of the bank at the time they accepted the deposit.

In the case of Tatum vs. Commercial Bank and Trust Co. (Ala.), 69 S. 508, L. R. A. 1916 C, 767,

774, the distinction between cases like the Perth-Amboy case and the instant case is clearly pointed out, and a great number of authorities are cited. After stating the general rule that a corporation is chargeable with the knowledge of its officers or agents and the exception that, if the officer or agent has an individual interest in the matter adverse to the corporation, the corporation is not so charged. the court states that this exception has a qualification or limitation as to cases like the one on trial. that is, where the corporation has no other agency or representative in the matter and where the party asserting the knowledge or notice on the part of the corporation is guilty of no negligence or fault in the transaction. After reviewing the cases, the court sums up the rule as follows:

"The authorities, therefore, lend support to two qualifications applied in *Bookhouse vs. Union Publishing Co.* 

- "1. That the exception does not apply when the officer of the corporation, though he acts for himself or a third person, is also the sole representative of the corporation in the transaction. This qualification, as applied by the cases is not at all dependent upon the question whether or not the corporation would be benefitted by the transaction as a whole, if the knowledge possessed by its officer were held not to be chargeable to it.
- "2. That the exception does not apply where the corporation, even if it were held not to be

chargeable with notice of the fraud of its officer, would, as a result of the whole transaction, be in a better position."

In the instant case, the appellees, while denying that the cashier's knowledge is imputable to the Bank, seek to retain the benefits of the transaction between the Bank, acting through the cashier, and the county treasurer.

To hold that the appellants are not entitled to recover is to permit the bank and the general creditors to keep over Thirty-five Thousand (\$35,000.00) Dollars which they would not have received if the Bank's agent, Mr. Stewart, had not permitted the deposit by the county treasurer.

With the facts as they are shown by the record in this case and the law as announced in the majority opinion, an officer of a corporation can defraud a third party out of money for the benefit of his corporation and the corporation can retain the proceeds of the fraud and defend on the ground that it is not chargeable with the knowledge of its officer.

Such a rule is contrary to the well established principle of law that a person cannot receive the benefits of a transaction and at the same time disclaim responsibility for the measures by which they were acquired.

21 R. C. L. 932, and cases cited.

Atlantic Mills vs. Indian Orchard Mills, 147

Mass. 268; 9 Am. St. Rep. 698.

Furthermore, the doctrine announced in this case

to the effect that the Bank is not chargeable with the knowledge of its Cashier is contrary to the rule established by the Supreme Court of the United States in the case of *St. Louis & S. F. R. Co. vs. Johnston*, 133 U. S. 576, and cases cited therein.

The Supreme Court of the State of Washington, in the case of *Raynor vs. Scandinavian-American Bank*, 22 Wash. Dec. 46 (decided Nov. 3, 1922), quoted with approval from the case last above cited as follows:

"This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the President of the bank was a member. The knowledge of the President was the knowledge of the bank. Martin vs. Webb, 110 U. S. 715; Banks vs. Walker, 130 U. S. 267; Cragie vs. Hadley, 99 N. Y. 131."

### III.

THE TREASURER'S DEPOSIT IS TRACED INTO THE WARRANTS.

The evidence of Mr. Tucker, Vice-President of the United States National Bank, is that Mr. Stewart brought the Pope & Talbot draft to the Portland Bank, after closing hours; stated that he had come for the purpose of procuring the warrants; took the draft to the note teller's cage and received the warrants; that he then directed the deposit of the warrants so procured as collateral security to the County Treasurer and directed that the receipt should be mailed to the Treasurer; and that subsequently, after Mr. Stewart had departed, as a matter of convenience in bookkeeping, the whole amount received by the note teller was credited to the Kelso Bank's account and a debit, for the amount due on the warrants, was charged to that account; that Mr. Stewart made no deposit and that he drew no check against the Kelso Bank's account (R. 162-175).

This testimony is absolutely uncontradicted and, under the rule cited in the majority opinion, this court cannot find to the contrary.

However, even if the money had been deposited by the Kelso Bank, as a general deposit, and a check drawn against it to pay for the warrants, the legal presumption would be that it was the trust funds which were used to obtain the warrants.

Brennan vs. Tillinghast, 201 Fed. 609 (614).

In the above case, the court cited the rule as follows:

"It is true that in the case of blended moneys in a bank account, consisting in part of trust funds, from which there have been drawings from time to time, it has been held, in favor of the cestui que trust, as a presumption of law, that the sums first drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund, which he had no right to use. In re Hallett's Estate, 13 Ch. D. 696, 727; Board of

Commissioners vs. Strawn, supra, at page 51. It is clear, however, in the first place, that this is a mere presumption, which will not stand against evidence to the contrary. Board of Commissioners vs. Strawn, supra, at page 51.

"And it is furthermore clear that this rule of presumption has no application where the evidence shows that the first moneys drawn out of the mingled fund by the tort-feasor were not in fact dissipated by him at all, but were merely transferred, in a substituted form, to another fund retained in his own possession. In such case, it must be held that the trust attaches to the substituted form in which the property is retained by the tort-feasor, and that the right to follow the trust in such form is not lost by reason of the fact that the tort-feasor thereafter draws out and spends for his own purposes the balance of the fund in which the trust money was originally mingled. The English case of In re Oatway, L. R. 2 Ch. 356, 359, directly sustains this view. In that case Oatway, a joint trustee under a will, had sold a portion of the trust property and deposited the proceeds to his own credit in bank with other funds belonging to himself. Out of this deposit. consisting in part of the proceeds of the converted trust fund and in part of his own moneys, Oatway purchased certain shares of stock in the Oceana Company, which he took and retained in his own name. Thereafter he drew out and paid away irrevocably for his own individual purposes the entire remainder of the bank deposit. It was held that, under this state of facts, the *cestui que trust* was entitled to follow the shares of stock thus purchased by Oatway. Joyce, J., said:

"'If money held by any person in a fiduciary capacity be paid into his own banking account, it may be followed by the equitable owner, who, as against the trustee, will have a charge for what belongs to him upon the balance to the credit of the account. then, the trustee pays in further sums, and from time to time draws out moneys by checks, but leaves a balance to the credit of the account, it is settled that he is not entitled to \* \* \* maintain that the sums which have been drawn out and paid away so as to be incapable of being recovered represented pro tanto the trust money, and that the balance remaining is not trust money, but represents only his own money paid into It is, in my opinion, the account. equally clear that when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustec, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains represents his own money alone, and that what has been spent and can

no longer be traced and recovered was the money belonging to the trust. \* \* \* The order of priority in which the various withdrawals and investments may have been respectively made is wholly immaterial. \* \* \* In the present case there is no balance left. The only investment or property remaining which represents any part of the mixed money paid into the banking account is the Oceana shares purchased for £2,137. Upon these, therefore, the trust had a charge for the £3,000 trust money paid into the account. That is to say, those shares and the proceeds thereof belong to the trust. vestment by Oatway, in his own name, of the £2,137 in Oceana shares no more got rid of the claim or charge of the trust upon the money so invested than would have been the case if he had drawn a check for £2,137 and simply placed and retained the amount in a drawer without further disposing of the money in any way. The proceeds of the Oceana shares must be held to belong to the trust funds under the will of which Oatway and Maxwell Skipper were the trustees.'

"In like manner we are of opinion that in the present case it must be held that the transfer by the Ironwood Bank to its own vaults, through the cash draft transactions, of \$2,-807.32, of the balance standing to its credit

in the Duluth Bank in which the trust fund had been mingled, did not divest the money thus transferred of its character as a trust fund, but as this money remained thereafter in its own vaults and in its own custody, and subsequently passed into the hands of the receiver as part of the cash assets of the bank, it remained subject in all respects to the trust originally impressed upon the proceeds of the sale of Brennan's stock."

The majority opinion suggests the rule that, where trust moneys are used to pay the debt of an insolvent, the insolvent estate not being benefited, the trust is dissipated. That rule is inapplicable here because the debt paid (granting that it was the payment of a debt) was a secured debt and the effect of the payment was to release assets into the insolvent Bank's estate.

It matters not, therefore, whether the transaction is construed to be either a purchase, under the repurchase agreement literally construed, or the payment of a loan. If it was a purchase, the Treasurer's money bought the warrants. If it was the payment of a loan, the Treasurer's money (paying the loan) became equitably entitled to the security which protected that loan.

In either event, the Treasurer's money enriched the insolvent's estate. If the Treasurer's money had not been turned into the Portland Bank, then the appellees, to recover the warrants, must pay the Portland Bank in full; whereas, under the majority's ruling, they take the warrants without paying the Portland Bank or any one else any sum whatever, thereby enhancing the insolvent estate to the extent of \$32,897.97, the amount of the Pope & Talbot draft.

Under the well established rule so recently announced by the Supreme Court of the State of Washington, in the case of Raynor vs. Scandinavian-American Bank (decided Nov. 3rd, 1922, 22 Wash. Decs. 46), it is only necessary to show that the gross assets of the Bank have been augmented by the deposit which it sought to recover. In other words, all that the Kelso Bank's creditors can ask is that they receive the same amount that they would have received if the deposit and subsequent transactions had never occurred.

### IV.

THE WARRANTS PLEDGED APPLY IN PROTECTION OF PAST, AS WELL AS CONTEMPLATED FUTURE, DEPOSITS.

Mr. Tucker testified that Mr. Stewart directed the deposit of the warrants for safe-keeping as security for deposits of County funds, and that the collateral receipt should be sent to the County Treasurer (R. 165); that he (Tucker) placed the warrants in the Portland Bank's safe-keeping department, and instructed the issuance of the receipt

(R. 170). The receipt is in evidence (Ex. 31). That was the transaction which took place. We neither evade nor dispute that Mr. Stewart had in mind that the County Treasurer would thereby be enabled to deposit more moneys, but in no testimony is there ever shown any arrangement or suggestion that the collateral security was limited, in its application, to future deposits. The written evidence and Mr. Tucker's testimony of Mr. Stewart's oral instructions are entirely devoid of any such suggestion. The intention of the parties, as gleaned from the uncontradicted testimony, was that all securities available to the County Treasurer were to cover all of his deposits, past and future.

Mr. Brown testified that Stewart sent Plamonden seeking more of the County's deposits and his answer was, "That, if he would put up the security, he would possibly get the deposits" (R. p. 177).

We repeat again that the record is absolutely devoid of testimony that the warrants were pledged to secure the Treasurer as to subsequent deposits only. The pre-existing indebtedness was a sufficient consideration to support the pledge. We feel that, on this subject at least, appellants' brief (pp. 34-41) is adequate and conclusive, and that therefore the majority has failed to get the true analysis and purport of the record.

We feel that somehow we have failed to convey to the majority of the court the true importance, significance, import and legal effect of the salient features of the testimony in this case. We humbly suggest that the majority opinion is not worthy of this high court. We are convinced that the fault must be our own. But fault there is—of that we are firmly convinced.

The amount involved herein is not inconsequential. Of greater and more lasting importance, however, is the proper application of legal principles. An erroneous declaration of a legal principle, or its misapplication, by a court of last resort, is a harm that time will not heal; it but intensifies the wrong. Under our judicial system, a bad precedent, or judgment ill pronounced, does not die with its pronouncement, but lives to touch and tarnish the entire current of the law.

We sincerely feel that justice will be accomplished more surely if we shall be permitted again to trespass upon the courtesy of the court. If our present convictions are erroneous, a rehearing will have cost little and make certain that fact. If, through our fault, the court has erred, a rehearing will correct that error by doing justice not only to our present clients, but to future litigations and to this court itself.

Respectfully submitted,

McCamant & Thompson and
Grinstead, Laube & Laughlin,

Solicitors for Appellants.

Wallace McCamant and
Loren Grinstead,

Of Counsel.

I hereby certify that, in my judgment, the foregoing petition for rehearing is well founded in law; and is not made, nor interposed, for delay.

LOREN GRINSTEAD,

Solicitor for Petitioner.

## United States

## Circuit Court of Appeals

For the Ninth Circuit.

JAMES B. A. FOSBURGH, as Trustee of the Estate of CONTINENTAL CANDY CORPORATION, a Corporation, Bankrupt,
Appellant,

VS.

CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY, a Corporation, THE
FIRST NATIONAL BANK OF SAN
FRANCISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation,
Appellees.

# Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.





## United States

## Circuit Court of Appeals

For the Ninth Circuit.

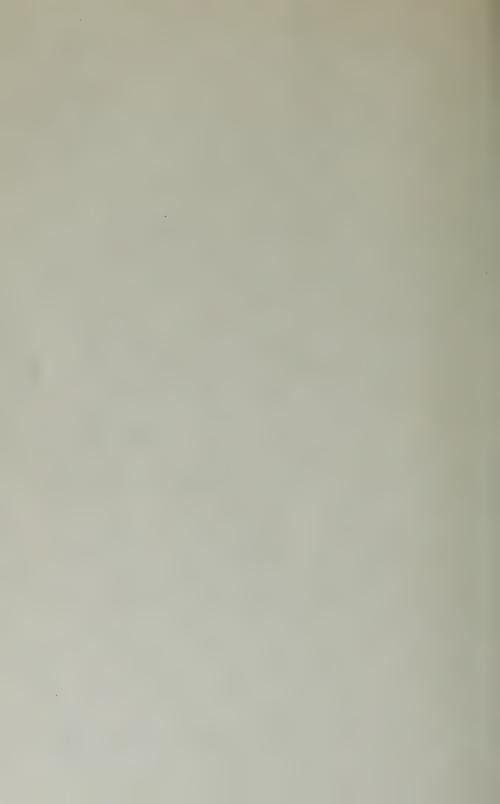
JAMES B. A. FOSBURGH, as Trustee of the Estate of CONTINENTAL CANDY CORPORATION, a Corporation, Bankrupt,
Appellant,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING COMPANY, a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation, Appellees.

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Upon Appeal from the Southern Division of the
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Second Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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CUSHING & CUSHING, First National Bank Bldg., San Francisco, California,

Attorneys for Appellee, First National Bank of San Francisco, a Corporation.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

### IN EQUITY.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CAN-TON BANK, a Corporation,

Defendants.

### Bill of Complaint.

To the Honorable Judges of said District Court, in Chancery Sitting:

Your orator, Continental Candy Corporation, plaintiff, a corporation organized and existing under the laws of the State of New York, and a citizen of said State of New York brings this, its Bill of Complaint against California and Hawaiian Sugar Refining Co. a corporation, The First National Bank of San Francisco, California, also a corporation, and Canton Bank, also a corporation, each off whom is a citizen and resident of the State of California, and of the District and Division aforesaid, and each of whom is hereby made a party de-

fendant to this bill, and your orator thereupon complains and alleges:

- 1. Continental Candy Corporation, hereinafter for convenience when referred to by name called "Continental Company," is, and was at all of the times hereinafter mentioned, a corporation organized and existing under the laws of the State of New York, [1\*] a citizen of the State of New York, and having its principal office in said State of New York, and engaged, among other things, in manufacturing in the States of New York, New Jersey and Illinois, and in no other states, and also engaged in buying and selling sugar, as it was authorized to do by its charter and by license issued prior to May, 1920 (and then, and after May 18, 1920, in force) by the United States Sugar Equalization Board, an agency established by the President of the United States under and in pursuance of the Act of Congress of August 10, 1917, commonly known as the "Lever Act." And at all times hereinafter mentioned said plaintiff was, and is, engaged in interstate commerce.
- 2. California and Hawaiian Sugar Refining Co., hereinafter for convenience when referred to by name called the "Hawaiian Company," was at all the times hereinafter mentioned, and is, a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen and resident of said State of California and of the District and Division aforesaid and engaged in the business of importing, manufacturing, buying and

<sup>\*</sup>Page-number appearing at foot of page of original certified Transcript of Record.

selling of sugar. Said defendant Hawaiian Company was at all times hereinafter mentioned and is, engaged in interstate commerce, and in commerce with foreign countries.

- 3. The defendant First National Bank of San Francisco, California, was at all of the times hereinafter mentioned and now is, a corporation duly formed, organized and existing under and by virtue of the laws of the United States, and a citizen of the State of California, with its principal place of business in the City and County of San Francisco, in the State of California, and a resident of the District and Division aforesaid.
- 4. The defendant Canton Bank at all of the times hereinafter mentioned was, and now is, a corporation duly formed, organized and existing under and by virtue of the laws of the State [2] of California, and a citizen of the State of California, with its principal place of business in the City and County of San Francisco, in the State of California, and a resident of the District and Division aforesaid.
- 5. The amount of the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000) Dollars, and this suit and this controversy is between citizens of different states, and the matter in controversy arises under the laws of the United States; so that the above-entitled cause is, therefore, within the jurisdiction of this Honorable Court.
- 6. On May 14, 1920, plaintiff entered into a certain written contract with the defendant Hawaiian

Company, a true copy of which said contract is attached to this bill of complaint, marked Exhibit "A," and is hereby specifically referred to and made a part hereof the same as if the terms and conditions of said agreement were here fully alleged and set forth at length. Said contract was dated and was executed by plaintiff in the City of Chicago, State of Illinois, and the plaintiff there dealt with an agent of said Hawaiian Company, namely, Seavey & Flarsheim Brokerage Co., and after said contract was so executed by plaintiff in said City of Chicago, it was sent on by said Seavey & Flarsheim Brokerage Co. to defendant Hawaiian Company at the City of San Francisco, in the State of California, where it was accepted in writing by said defendant Hawaiian Company by its duly authorized officer and agent; and thereupon an executed copy thereof was delivered to plaintiff. Said contract of May 14, 1920, attempted to provide for the sale by said defendant Hawaiian Company, and the purchase by plaintiff, of 750 tons (each 2240 lbs.) 10 per cent more or less, white Java sugar, 25 Dutch Standard, 99° polarization, then at Java, at the agreed price of \$19.85 per 100 lbs. thereof net [3] cash, duty paid, landed weights, f. o. b. cars San Francisco, California; 250 tons thereof, 10 per cent more or less, to be shipped from Java during September, 1920, and 500 tons thereof, 10 per cent more or less, to be shipped from Java during October, 1920. And said contract provided for the manner of payment of the purchase price, thereof, and contained, as integral parts of said contract, divers

conditions and restrictions sought to be made binding upon the buyer and to be for the benefit of the seller.

7. On May 18, 1920, plaintiff entered into a certain written contract with the defendant Hawaiian Company, a true copy of which said contract is attached to this bill of complaint, marked Exhibit "B," and is hereby specifically referred to and made a part hereof the same as if the terms and conditions of said agreement were here fully alleged and set forth at length. Said contract was dated and was executed by plaintiff in the City of Chicago, State of Illinois, and the plaintiff there dealt with an agent of said Hawaiian Company, namely, Seavey & Flarsheim Brokerage Co., and after said contract was so executed by plaintiff in said City of Chicago, it was sent on by said Seavey & Flarsheim Brokerage Co. to defendant Hawaiian Company at the City of San Francisco, in the State of California, where it was accepted in writing by said defendant Hawaiian Company by its duly authorized officer and agent; and thereupon an executed copy thereof was delivered to plaintiff. Said contract of May 18, 1920, attempted to provide for the sale by said defendant Hawaiian Company, and the purchase by plaintiff, of 500 tons (each 2240 lbs.) 10 per cent more or less, white Java sugar, 25 Dutch Standard, 99° polarization, then at Java, at the agreed price of \$19.85 per 100 lbs thereof, net cash, duty paid, landed weights, f. o. b. cars San Francisco, California; to be shipped from Java during October, 1920. And said contract provided for the manner of payment of the purchase price thereof, and contained, [4] as integral parts of said contract, divers conditions and restrictions sought to be made binding upon the buyer and to be for the benefit of the seller.

- 8. Subsequently each of the contracts mentioned in paragraphs 6 and 7 hereof were amended and modified by the agreement of both parties thereto, so that the words, "f. o. b. cars Crockett, California," were substituted in lieu of "f. o. b. cars San Francisco, California"; each of said last mentioned contracts being otherwise unchanged.
- Prior to the amendment and modification of said contracts mentioned in paragraph 8 hereof, plaintiff, in pursuance of the terms of said contracts, procured from the First National Bank of Chicago, a banking corporation organized under the laws of the United States, and a citizen and resident of the State of Illinois, and from Great Lakes Trust Company, a banking corporation, organized under the laws of the State of Illinois, and a citizen and resident of the State of Illinois, certain irrevocable Letters of Credit, authorizing said defendant Hawaiian Company to draw on the respective banks issuing said letters, certain specified sums aggregating the purchase price of said sugars fixed by said contracts mentioned in paragraphs 6 and 7 hereof. The terms of said letters of credit are hereinafter more fully stated in paragraphs 10 and 11 hereof. Said banks issuing said irrevocable letters of credit did so without knowledge by them, or either of them, of all the terms of said contracts

of May 14, 1920, and of May 18, 1920, and plaintiff is bound by its separate contracts with said First National Bank of Chicago and Great Lakes Trust Company, respectively, to repay to each of said last mentioned banks any sums advanced by it under its said letter of credit. Said First National Bank of Chicago and Great Lakes Trust Company are not necessary parties hereto, and neither of them is made a party hereto because neither [5] of them is within the jurisdiction of this Court and process of this Court cannot be served upon either of them.

10. On June 2, 1920, said First National Bank of Chicago issued to said defendant Hawaiian Company its letter of credit in the sum of \$300,000, authorizing said Hawaiian Company to value on the First National Bank of Chicago at sight for any sum or sums not exceeding in all \$300,000, for account of plaintiff, on shipment by said defendant Hawaiian Company of portions of the sugar agreed to be sold by it in said contracts of May 14, 1920, and May 18, 1920, provided said sugar was of specified quality, grade, test and character, being the same as specified in the contracts mentioned in paragraphs 6 and 7 hereoff, and provided the quantity of sugar on account of which the draft is drawn be shipped f. o. b. San Francisco, duty paid, and provided the Hawaiian Company's bill, or bills, be drawn on or before December 31, 1920, and accompanied by bill of lading and abstract of invoice, on receipt of which documents the letter declared the bills would be duly honored, and provided that shipment of 250 tons of said

sugar from Java be in September, 1920, and shipment of 1,000 tons of said sugar from Java be in October, 1920. Said letter of credit was declared to be confirmed and irrevocable. Said First National Bank of Chicago further agreed by said letter of credit with drawers, endorsers, and bona fide holders of drafts drawn under and in compliance with said letter of credit, that the said drafts would be duly honored upon presentation at the counter of said First National Bank of Chicago. And said letter of credit further provided that, if desired, drafts drawn under said letter of credit would be paid at the counter of the First National Bank of San Francisco, California. Subsequently to June 2, 1920, and by agreement between the First National Bank of Chicago and said defendant the First National Bank of San Francisco, California, and by agreement between plaintiff [6] and said defendant Hawaiian Company, said letter of credit was altered and modified so as to provide that delivery of said sugar was to be f. o. b. cars Crockett, California, instead of f. o. b. cars San Francisco, California.

11. On June 1, 1920, said Great Lakes Trust Company issued to said defendant Hawaiian Company its letter of credit in the sum of \$255,800, authorizing said Hawaiian Company to value on the Great Lakes Trust Company at sight for any sum or sums not exceeding in all \$255,800, for account of plaintiff, on shipment by said defendant Hawaiian Company of portions of the sugar agreed by it to be sold by said contracts of May 14, 1920,

and May 18, 1920, provided said sugar was of a quality, grade, test and character specified in said letter of credit the same as required by the contracts mentioned in paragraphs 6 and 7 hereof, and provided the quantity of sugar on account of which the draft is drawn be shipped from San Francisco, duty paid, and provided the Hawaiian Company's bill or bills, be drawn on or before December 31, 1920, and accompanied by clean railroad bills of lading and invoices in triplicate, on receipt of which documents the letter declared the bills would be duly honored, and provided that shipment of said sugar from Java be in September, and/or October, Said Great Lakes Trust Company further agreed by said letter of credit with drawers, endorsers, and bona fide holders of drafts drawn under and in compliance with said letter of credit, that the said drafts would be duly honored upon presentation at said Great Lakes Trust Company. And said last-mentioned letter of credit further provided that drafts under it might be negotiated, if desired, with the Canton Bank of San Francisco, California. Subsequently to June 2, 1920, and by agreement between Great Lakes Trust Company and said defendant Canton Bank, and by agreemnt between plaintiff and said defendant Hawaiian Company, said letter of credit was altered and modified [7] so as to provide that said sugar was to be shipped from Crockett, California, instead of from San Francisco, California.

12. Each of said contracts mentioned in paragraphs 6 and 7 hereof provided for transactions in

trade or commerce among the several states of the United States and with a foreign nation, and each related to articles intended to be imported into the United States from a foreign country. And each of said last-mentioned contracts provided for the shipment of articles to the United States from Java, which is part of a foreign country, and said defendant Hawaiian Company intended, as principal, to import the said sugar so to be shipped from Java into the United States.

Each of said contracts mentioned in said paragraphs 6 and 7 hereof provided that plaintiff should use the sugars covered by each of said contracts of sale only for its own manufacturing needs. and under no circumstances to resell the said sugar, or any part thereof, and it was further provided by each of said contracts that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the defendant Hawaiian Company from what was spoken of as the delivery date of such sugar until the end of the year 1920. The said lastmentioned provisions and conditions, and the whole and entire agreement of sale between plaintiff and said defendant Hawaiian Company, contained in each of said contracts of May 14, 1920, and May 18, 1920, were, and are, illegal, null and void, for the reason that said restriction against. and said forbidding of, the resale of said sugar, or any part thereof, by plaintiff, as well as the forbidding of the sale of any more or other sugar in addition to the amounts and quantities specified in said contracts of May 14, 1920 and

May 18, 1920 by defendant Hawaiian Company to plaintiff, prior to the end of the year 1920, were, and are, in unlawful and unreasonable restraint of trade, both between the parties to said contracts themselves, and [8] in regard to the public at large. And said last-mentioned provisions of said contract were in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states or with foreign nations, and forbidding restraint of lawful trade or free competition in lawful trade or commerce of any articles imported or intended to be imported into the United States. Each of said contracts of sale, and the terms and conditions thereof, were in such unreasonable and unlawful restraint of trade as to be at variance with and contrary to public policy and interest, and are unreasonable and detrimental to plaintiff and to the interest and policy of the public at large. The said restraint of trade embodied in and effected by the said contracts of sale and the terms and conditions thereof are in ununqualified restriction of trade in a necessary commodity dealt with in trade and commerce among the several states, and are, for that reason, illegal and fraudulent, and effect a withholding and removing of said necessary commodity from the public market and from the public use and restrict the freedom of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for said necessary commodity and a monopolistic inflation and raising of prices of and for the same.

- 14. Each of said contracts mentioned in paragraphs 6 and 7 hereof is entirely and wholly illegal and void because each contains provisions constituting integral parts of each of said contracts and providing that all disputes and controversies under each of said contracts should be finally settled by a prescribed arbitration, extra-legal in character, the effect of which provisions was and is to oust the courts of jurisdiction, and said provisions were, and are, contrary and inimical to the public interest and welfare. [9]
- 15. At and before the time of the entering into of said contracts mentioned in paragraphs 6 and 7 hereof said plaintiff questioned the agent of said defendant Hawaiian Company negotiating the said contracts as to the presence and inclusion of the said terms and conditions referred to in paragraphs 13 and 14 hereof, and protested their inclusion in said contracts and each of them, but said plaintiff was informed by said agent of said defendant Hawaiian Company which said agent was duly authorized to represent said last-mentioned defendant with respect thereto, that plaintiff could purchase the said sugar, or any other sugar of like quality or kind, only under forms of contract embodying therein the said terms and conditions, including the terms and conditions mentioned in paragraphs 13 and 14 hereof, and thus, in order to effect a purchase of sugar, plaintiff was thereby forced to execute and enter into the said contract of sale embodying the said terms and conditions hereinabove mentioned in paragraphs 13 and 14.

- 16. Each of said contracts mentioned in paragraphs 6 and 7 hereof was and is unilateral and without mutuality in that each gave defendant Hawaiian Company the privilege of cancelling the contract if strikes, wars, revolutions, accidents, dangers of the seas or other unforseen events beyond control, prevented shipment or delayed delivery of said sugar, and each of said contracts was therefore a nudum pactum and unenforceable.
- 17. Neither of said contracts mentioned in paragraphs 6 and 7 hereof provided for any date of delivery of said sugar to the buyers f. o. b. cars San Francisco, California, or as each of said contracts was later modified and amended, f. o. b. cars Crockett, California, and while each of said contracts contained provisions as to the date when shipments were to be made from Java to the United States, neither contained any provision whatever for the time of delivery of said sugar from the possession and control of said [10] defendant Hawaiian Company to the possession and control of said plaintiff; so that each of said contracts was and is in law terminable on reasonable notice from one party to the other prior to delivery from the buyer to the seller. As hereinafter more fully stated, plaintiff has given notice to said defendant Hawaiian Company of the termination and cancellation of said contracts dated May 14, 1920, and May 18, 1920, and each of them.
- 18. Said defendant Hawaiian Company has not complied with the material provision of said contract of May 14, 1920, between it and plaintiff re-

quiring said Hawaiian Company to ship 250 tons of sugar from Java during the month of September, 1920, but on the contrary has caused an unknown quantity to be shipped from Java on a vessel which, by its accustomed itinerary of voyage, left one port of Java on September 30, 1920, bound for other islands and then returned to another port of Java and did not leave said last-mentioned port of Java until well into the month of October, 1920, as your orator is informed and believes, and upon such belief, occasioned by such information, plaintiff has rescinded the entire contract of May 14, 1920, as more fully hereinafter stated.

Prior to the filing of this bill of complaint plaintiff has served upon said defendant Hawaiian Company at San Francisco, California, written notices advising and notifying said defendant Hawaiian Company that plaintiff has rescinded each of the contracts mentioned in paragraphs 6 and 7 hereof for fraud and illegality, that it treats and regards each of said last-mentioned contracts as void and unenforceable, and that it terminates each of said contracts by reason of the indefiniteness of the time of performance thereof by said defendant Hawaiian Company and by reason of no delivery having yet been attempted under either of said contracts, and also notifying and advising the said defendant [11] Hawaiian Company that plaintiff has rescinded the entire contract of May 14, 1920, by reason of the noncompliance by said defendant Hawaiian Company with the material provision of said contract of May 14, 1920, requiring 250 tons of said sugar to be shipped from Java during the month of September, 1920.

20. Your orator is informed and believes that a large quantity of sugar, perhaps sufficient to include the quantity covered by said contracts between plaintiff and defendant Hawaiian Company, has arrived in San Francisco by vessels arriving on the 23d day of November, 1920, and thereafter, and that the defendant Hawaiian Company, notwithstanding the receipt by it of notice of cancellation and rescission of said contracts of sale heretofore served upon it by plaintiff, as set forth in paragraph 19 hereof, and notwithstanding the illegality and voidness of said contracts of sale, is about to tender and offer to plaintiff part of the said sugar which has arrived in San Francisco, or the whole thereof, and is about to present to said defendants, The First National Bank of San Francisco, California, and Canton Bank, the papers and documents required in and by the said irrevocable letters of credit as hereinbefore alleged, and is about to value on and under said letters of credit and thereby obtain payment in full of and for the 750 tons of sugar covered by said contract of May 14, 1920, and of and for the said 500 tons of sugar covered by said contract of May 18, 1920, or for portions of said 1250 tons; and that the said defendant The First National Bank of San Francisco, California, and Canton Bank, are, upon presentation of drafts under said letters of credit, accompanied by the required papers and documents, about to pay to said defendant Hawaiian Company the full purchase

price of and for all or large parts of the sugar covered by said contracts of May 14, 1920, and May 18, 1920.

- 21. By reason of the fact that defendant Hawaiian [12] Company in and by said contracts of sale between it and plaintiff has demanded that plaintiff establish said irrevocable letters of credit, as hereinbefore set forth, and by reason of the fact that said irrevocable letters of credit so established by plaintiff, as hereinabove alleged, are still in full force and effect, and are irrevocable, and plaintiff is therefore unable to stop payment of said purchase price of and for said sugar and the whole thereof under said irrevocable letters of credit by the said defendant The First National Bank of San Francisco, California, and Canton Bank, as hereinbefore alleged, plaintiff is unable to prevent the enforcement and carrying out of said illegal, null and void contracts of sale, or either of them, and unable to prevent the payment of the purchase price of and for said sugar thereunder, unless the said defendant, California and Hawaiian Sugar Refining Company, and the said defendants, The First National Bank of San Francisco, California, and Canton Bank, are enjoined and restrained from receiving or making payment of the said purchase price for said sugar and any part thereof under said irrevocable letters of credit or either of them.
- 22. Unless said injunction be granted plaintiff will sustain and suffer irreparable injury in that, if drafts be drawn under said letters of credit and

are honored and paid, plaintiff will be at once compelled to pay to said First National Bank of Chicago and Great Lakes Trust Company the amounts of said drafts, which may aggregate \$555,-800, nothwithstanding plaintiff will have received nothing under said contracts, and in that it would be necessary for plaintiff to proceed to the State of California, of which plaintiff is a nonresident, in order to sue at law said defendant Hawaiian Company for damages, to the great annoyance and expense of plaintiff, and with the loss of the use of said vast sums of money covered by said letters of credit, which loss [13] of use would seriously jeopardize its financial strength during the pendency of an action to recover damages, and in that, moreover, if such action to recover damages be instituted and maintained said defendant Hawaiian Company could, and your orator is informed and · believes, would, contend that in so far as plaintiff's right of action depended on a claim by plaintiff that said contracts of May 14, 1920, and May 18, 1920, were illegal and contrary to public policy, said right of action could not be maintained because, on the part of the said defendant Hawaiian Company, it was an executed contract and because a court of law would not lend its aid to recover back money paid on a contract illegal and contrary to public policy, and said defendant Hawaiian Company could contend that in so far as such right of action of plaintiff depended on claims by plaintiff that each of said contracts was nudum pactum or terminable by plaintiff on reasonable notice, the procuring of

issuance of letters of credit by which payments were effected was the result of a mistake of law by plaintiff which would preclude recovery of damages sustained by it as a result of payments of the purchase price fixed by the said contracts of May 14, 1920, and May 18, 1920. And so, unless the injunction herein prayed for be granted, plaintiff may be subjected to great loss and damages without any redress or relief whatever on account thereof, and therefore plaintiff is without recourse save in a court of equity.

23. If notice of the application for a temporary restraining order be given to the defendants plaintiff will, it believes, suffer immediate and irreparable loss or damage before the matter can be heard by this honorable Court on notice, for the reason that large parts of the sugar covered by said contracts of May 14, 1920, and May 18, 1920, are already unloaded from said vessels and about to be shipped on railroad cars, so that it would be the work of but a few minutes for said defendant Hawaiian [14] Company to value or draw drafts under said letters of credit and to present them for payment, and said last-mentioned defendant, will, plaintiff believes, so value or draw drafts, if notice of said application be given any of said defendants, and said other defendants will then honor and pay said drafts, to the irremediable loss and damage of plaintiff as hereinbefore set forth.

WHEREFORE plaintiff prays:

First. That the said defendant, California and Hawaiian Sugar Refining Co., its officers, servants,

members, and agents, and all other persons acting with or for it, or aiding or assisting it, be enjoined. pending the trial of this suit, from delivering to plaintiff, or offering to deliver to plaintiff the said sugar, or any part thereof, and from valuing or drawing under the letters of credit hereinabove mentioned, and from negotiating or assigning any drafts so drawn under said letters of credit, and from taking or receiving payment from said defendant. The First National Bank of San Francisco, California, and/or the defendant, Canton Bank, or from the said First National Bank of Chicago, or from said Great Lakes Trust Company, of the said purchase price of and for said sugar. or any part thereof, under said letters of credit, or any of them and that said defendant. The First National Bank of San Francisco, California, and/or the said defendant. Canton Bank, their respective officers, servants, agents, and members, and all other persons acting with, or aiding or assisting them, or any of them, be enjoined, pending the trial of this suit, from paying the said defendant, California and Hawaiian Sugar Refining Company, the said purchase price of and for said sugar or any part thereof, under said letters of credit, or either of them.

Second. That a restraining order be issued and be in full force and effect and binding upon and against each and all of said defendants above named, restraining and enjoining them, [15] as hereinabove prayed and set forth, from the time

that said defendants shall have knowledge of the existence of said restraining order.

Third. That upon the final hearing of this cause the injunction prayed for in the first prayer hereof may be made permanent.

Fourth. That the said contracts of sale of May 14, 1920, and May 18, 1920, between plaintiff and defendant, California and Hawaiian Sugar Refining Co., be declared illegal, null and void, cancelled and rescinded

Fifth. That, in the event payment of and for the purchase price of said sugar, or any part thereof, shall have been effected and consummated between said defendants, or between any of them, or between any said defendants and said First National Bank of Chicago and said Great Lakes Trust Company, prior to the commencement of, or pending, this action, that the full amount of said payments so effected and consummated be decreed to be returned to plaintiff, and that defendant California and Hawaiian Sugar Refining Co. be decreed to reimburse plaintiff for any loss damages which plaintiff may suffer by reason of any acts unlawfully and improperly performed by said defendant California and Hawaiian Sugar Refining Co. under said illegal, void and rescinded contracts.

Sixth. That the defendants and each of them be required to answer this bill of complaint, but not under oath, answers under oath being hereby expressly waived.

Seventh. That the Court may fully ascertain and declare the rights of all the parties in and to the subject matter of this controversy and suit, and that the Court may grant such other and further relief to plaintiff as to your Honors may seem meet [16] and equitable in the premises.

And your orator will ever pray, etc.

IRA S. LILLICK,
CHARLES LeROY BROWN,
Attorneys for Plaintiff. [17]

## Exhibit "A."

Kansas City, Mo. Chicago, Ill. Omaha, Neb. St. Joseph, Mo. Minneapolis, Minn. St. Louis, Mo. Wichita, Kans. St. Paul, Minn. Davenport, Iowa.

#### DUPLICATE.

## SEAVEY & FLARSHEIM BROKERAGE CO.

U. S. Food Administration License No. G-02928 326 West Madison Street,

Chicago, Ill.

CONTRACT In Triplicate.

May 14, 1920.

1. The California & Hawaiian Sugar Refining Co., of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Illinois, have to-day bought the following sugars:

750 tons, each 2,240 lbs. 10% more or less, White Java Sugar at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California; 25 Dutch Standard—99 Polarization.

250 tons, 10% more or less, shipment from Java September, 1920.

500 tons, 10% more or less, shipment from Java October, 1920.

- 2. PAYMENT: Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.
- 3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.
- 4. Any change of import duty understood to be for account of buyer.
- 5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.
- 6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.
- 7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY CORPORATION.

BEN SCHNEEWIND,

President.

Confirmed and accepted.

# (Seller) CALIFORNIA AND HAWAIIAN SUGAR REFINING CO.

L. CAMPIGLIA,

Assistant Sales Manager. [18]

### Exhibit "B."

Kansas City, Mo. Chicago, Ill. Omaha, Neb. St. Joseph, Mo. Minneapolis, Minn.

DUPLICATE.

St. Louis, Mo. Wichita, Kans. St. Paul, Minn. Davenport, Iowa.

# SEAVEY & FLARSHEIM BROKERAGE CO. 326 West Madison Street,

U. S. Food Administration License No. G-02928 Chicago, Ill.

CONTRACT.

In Triplicate.
May 18, 1920.

1. The California & Hawaiian Sugar Refining Co., of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Illinois, have to-day bought the following sugars:

500 tons, each 2,240 lbs. 10% more or less, White Java Sugar, at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California, shipment from Java during October, 1920; No. 25 Dutch Standard, 99 Polarization.

2. PAYMENT: Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being

delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

- 3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.
- 4. Any change of import duty understood to be for account of buyer.
- 5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.
- 6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.
- 7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY COR-PORATION.

BEN SCHNEEWIND,

Confirmed and accepted.

(Seller) CALIFORNIA & HAWAIIAN SUGAR REFINING CO.

L. CAMPIGLIA, Asst. Sales Manager. [19] State of California, City and County of San Francisco,—ss.

Frank J. King, being first duly sworn, deposes and says: That he is an officer, to wit, the Assistant Secretary, of Continental Candy Corporation, a corporation, named as plaintiff in the foregoing action, and, as such, is duly authorized to make this verification on behalf of said plaintiff; that he has read the foregoing bill of complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on information or belief, and that, as to those matters, he believes it to be true.

## FRANK J. KING.

Subscribed and sworn to before me this 1st day of December, 1920.

[Seal] J. A. SCHAERTZER,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 1, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

# (Subpoena Ad Respondendum.) UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

## IN EQUITY

The President of the United States of America, GREETING: To California and Hawaiian Sugar Refining Co., a Corporation, the First National Bank of San Francisco, California, a Corporation, and Canton Bank, a Corporation.

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Second Division, aforesaid, at the courtroom in the City of San Francisco, twenty days from the date hereof, to answer a bill of complaint exhibited against you in said court by Continental Candy Corporation, a corporation organized and existing under the laws of the state of New York which is a citizen of the state of New York and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 1st day of December, in the year of our Lord one thousand

nine hundred and twenty and of our Independence the 145th.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer, Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's office of said court, pursuant to said bill; otherwise the said bill [21] may be taken pro confesso.

WALTER B. MALING,

Clerk.

B. J. A. Schaertzer, Deputy Clerk.

### MARSHAL'S RETURN.

I hereby certify that on the 1st day of December, 1920, at San Francisco, California, I served the within subpoena ad respondendum on California and Hawaiian Sugar Refining Co., a corporation, The First National Bank of San Francisco, California, a corporation and Canton Bank, a corporation, by handing to and leaving with Warren H. McBride, Secretary of the California & Hawaiian Sugar Refining Co., a true copy of the within writ, Wm. M. Cadogan, Vice Pres. of the

First National Bank of San Francisco, a true copy of the within writ, and E. F. Sagear, Gen. Mgr. of the Canton Bank, a true copy of the within writ, and at the same time handing to and leaving with each of the above named a certified copy of order to show cause and restraining order.

J. B. HOLOHAN, U. S. Marshal. By Frank J. Ralph, Deputy.

[Endorsed]: Filed Jan. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

5.6

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCICO, CALIFORNIA, a Corporation, and CAN-TON BANK, a Corporation,

Defendants.

## Motion to Dismiss Bill of Complaint.

Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, moves this Honorable Court for an order directing the dismissal of the bill of complaint herein, for the reasons and upon the grounds that it appears upon the face of said bill of complaint that:

- 1. The plaintiff is not entitled to the relief prayed for by its bill of complaint against this defendant, nor to any relief arising from the facts alleged in said bill of complaint.
  - 2. Said bill of complaint is wholly without equity;
- 3. There is a nonjoinder of necessary parties [23] defendant herein, in this, that the First National Bank of Chicago, and Great Lakes Trust Company, the two Chicago banks which upon the procurement of the plaintiff have heretofore issued to this defendant the letters of credit mentioned in said bill of complaint, upon which the plaintiff seeks to enjoin this defendant from valuing, and against which it seeks to enjoin this defendant from drawing or presenting drafts, are neither of them joined as a party defendant.
- 4. The plaintiff acquiesced in the validity of each of the contracts of sale dated May 14, 1920, and May 18, 1920, respectively, and in the validity thereof, from the date of said respective contracts

until December 1, 1920, and made no claim of the invalidity of said contracts or either of them, despite the fact that during all of said time the market price of sugar of the quality and grade covered by each of said contracts was steadily falling, and that by reason thereof the plaintiff has disentitled itself to any relief in equity, and it would be contrary to equity and good conscience for the Court to take cognizance of said bill of complaint or to allow the plaintiff to maintain the same.

5. Plaintiff has a plain, adequate and complete remedy at law in respect of the matters complained of in said Bill of Complaint.

WHEREFORE, and for divers other good reasons of objections appearing upon the face of said bill of complaint, this defendant prays this Honorable Court for an order directing the dismissal of said bill of complaint, and allowing this defendant its reasonable costs in this behalf sustained.

Dated, December 27, 1920.

DONALD Y. CAMPBELL, GARRET W. McENERNEY.

Attorneys for the Defendant, California and Hawaiian Sugar Refining Co. [24]

Receipt of a copy of the within motion, this 27th day of December, 1920, is hereby admitted.

CHAS. LEROY BROWN, IRA S. LILLICK,
JOHN S. PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY-No. 579.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CAN-TON BANK, a Corporation,

Defendants.

# Answer of Defendant the First National Bank of San Francisco.

Comes now the First National Bank of San Francisco (hereinafter, for the purposes of convenience, called "defendant"), one of the defendants in the above-entitled suit, and answering the bill of complaint herein for itself alone and not for any of the other defendants says:

1. As to the allegations of paragraph 1 of said bill of complaint, and each and all thereof, defendant is without knowledge.

- 2. As to the allegations of paragraph 2 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 3. Defendant admits the allegations of paragraph 3 of said bill of complaint.
- 4. As to the allegations of paragraph 4 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 5. As to the allegations of paragraph 5 of said bill of [26] complaint, and each and all thereof, defendant is without knowledge.
- 6. As to the allegations of paragraph 6 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 7. As to the allegations of paragraph 7 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 8. As to the allegations of paragraph 8 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 9. Defendant admits that the First National Bank of Chicago, a banking corporation organized under the laws of the United States, and a citizen and resident of the State of Illinois, issued a certain irrevocable letter of credit authorizing said defendant California & Hawaiian Sugar Refining Co. to draw on said First National Bank of Chicago up to a certain specified sum, to wit, Three Hundred Thousand Dollars (\$300,000). Defendant denies that said First National Bank of Chicago is not a necessary party to this suit, but on the contrary alleges that said bank last mentioned is a

necessary and indispensable party to said suit. Defendant has no knowledge concerning each and all of the remaining allegations of paragraph 9 of said bill of complaint, which are not in this paragraph specifically admitted or denied.

10. Defendant admits the allegations of paragraph 10 of said bill of complaint. In this behalf defendant alleges:

That heretofore, to wit, the 8th day of June, 1920, defendant received from the First National Bank of Chicago, a certain letter dated June 3, 1920, in words following:

"Messrs. First National Bank, San Francisco, Calif.

Dear Sirs:

We enclose herewith copy of our commercial letter of credit CCA #6385, in favor of the California & Hawaiian Sugar Refining Co., San Francisco, for \$300,000.00.

We also enclose copy of our letter of credit CCA #6414 in favor of the California & Hawaiian Sugar Refining Co., San Francisco, for \$19,564.16.

Kindly advise the beneficiaries that the credits are confirmed and irrevocable and that you are prepared to pay drafts drawn thereunder when presented in accordance with the terms of the credits. [27]

Please charge our account with such payments made, under advice to us, sending drafts to us with documents attached.

Thanking you for your attention, we beg to remain,

Yours very truly,

W. G. STRAND, Assistant Manager."

That there was enclosed with said letter a copy of letter of credit C. C. A6385 issued by the First National Bank of Chicago, which said copy of letter of credit is in words following:

\$300,000.

"No. C. C. A 6385. Capital and Surplus \$22,000,000. \$300,000.00 (U. S. Currency).

THE FIRST NATIONAL BANK OF CHICAGO. Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co.

San Francisco, Calif.

Gentlemen:

We hereby authorize you to value on The First National Bank of Chicago, at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of

1250 tons (2240 lbs. each)—99 test

25 Dutch Standard at \$19.85 per

100 lbs. F. O. B, San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920.

The Bills of Lading must be issued to the order of Shippers' and endorsed in blank.

The shipment must be completed and the Bill drawn on or before December 31, 1920, and the ad-

vice thereof (in duplicate) sent to the First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice on receipt of which Documents the Bills will be duly honored.

We hereby agree with drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of the First National Bank of Chicago.

This credit is confirmed and irrevocable.

## INSURANCE.

Drafts under this Credit must bear upon their face the words:

DRAWN UNDER THE FIRST NATIONAL BANK OF CHICAGO.

CREDIT NO. C. C. A6385 dated June 2, 1920.

Respectfully yours,

C. P. CLIFFORD,

V. P."

If desired, drafts drawn under this credit will be paid at the counter of the First National Bank, San Francisco., Calif.

[In Margin:] Countersigned: W. G. STRAND, Ass. Mgr. [28]

That upon receipt of said letter from the First National Bank of Chicago and said copy of letter of credit last mentioned and on said 8th day of June, 1920, defendant addressed and mailed to defendant California & Hawaiian Sugar Refining Co. a letter which was thereafter in due course of mail received by said California & Hawaiian Sugar Refining Co., which said letter was and is in words following:

"California & Hawaiian Sugar Refining Company, San Francisco,

California.

### Gentlemen:

We have received from the First National Bank, Chicago, copies of their Letters of Credit, No. CCA-6385 and CCA6414, for \$300,000.00 and \$19,564.16 respectively, both issued in your favor. These credits are irrevocable and are hereby confirmed, and we stand in readiness to pay your drafts drawn under their provisions.

Very truly yours,

L. F. CADOGAN,

Assistant Cashier."

Thereafter, to wit, the 20th day of August, 1920, the terms of said letter of credit were changed by said First National Bank of Chicago so as to provide that shipments should be made f. o. b. Crockett instead of f. o. b. San Francisco as provided for in said original credit, and at the request of said First National Bank of Chicago defendant on the 24th day of August, 1920, notified said California & Hawaiian Sugar Refining Co. that said letter of credit had been amended to read shipment f. o. b. Crockett instead of f. o. b. cars San Francisco, and said California & Hawaiian Sugar Refining Co. thereafter, to wit, the 25th day

of August, 1920, notified and advised defendant that said amendment was accepted by the California & Hawaiian Sugar Refining Co.; that said letter of credit, except as so modified, remains and is now in all other respects in full force and effect as the same was originally drawn as aforesaid. [29]

- 11. As to the allegations of paragraph 11 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 12. As to the allegations of paragraph 12 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 13. As to the allegations of paragraph 13 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 14. As to the allegations of paragraph 14 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 15. As to the allegations of paragraph 15 of said bill of complaint, and each and all of them, defendant is without knowledge.
- 16. As to the allegations of paragraph 16 of said bill of complaint, and each and all of them, defendant is without knowledge.
- 17. As to the allegations of paragraph 17 of said bill of complaint and each and all thereof, defendant is without knowledge.
- 18. As to the allegations of paragraph 18 of said bill of complaint, and each and all thereof, defendant is without knowledge.
  - 19. As to the allegations of paragraph 19 of

said bill of complaint, and each and all of them, defendant is without knowledge.

- 20. Defendant admits that, upon presentation to it of drafts drawn under said letter of credit issued by said First National Bank of Chicago accompanied by the papers and documents required by said letter of credit and upon compliance with the other terms of said letter of credit, it is willing to pay in accordance with the terms and provisions of said letter of credit but not otherwise to said defendant California & Hawaiian Sugar Refining Co. the full amount of which such drafts not exceeding in all Three Hundred Thousand Dollars (\$300,000.00), but defendant alleges that it will not pay any such draft in view of the temporary injunction heretofore issued herein, nor will it do anything which it is enjoined from doing by said temporary injunction. Defendant is without knowledge in respect [30] of each and all of the remaining allegations of paragraph 20 of said bill of complaint, which are not in this paragraph specifically admitted.
- 21. Defendant admits that, by reason of the fact that plaintiff herein has established said irrevocable letter of credit issued by said First National Bank of Chicago, and by reason of the fact that said letter of credit is still in full force and effect is irrevocable, plaintiff is unable to stop payment by defendant of any draft drawn under and in accordance with said irrevocable letter of credit, unless defendant is enjoined and restrained from making payment of any such draft drawn

under said irrevocable letter of credit. Defendant is without knowledge in respect of each and all of the remaining allegations of paragraph 21 of said bill of complaint, which are not in this paragraph specifically admitted.

- 22. As to the allegations of paragraph 22 of said bill of complaint, and each and all thereof, defendant is without knowledge.
- 23. As to the allegations of paragraph 23 of said bill of complaint, and each and all thereof, defendant is without knowledge.

For a further and separate answer and defense defendant alleges that said irrevocable letter of credit issued by said First National Bank of Chicago is separate and distinct from any contract made or entered into by or between plaintiff and defendant California & Hawaiian Sugar Refining Co., and that said irrevocable letter of credit is the independent agreement of said bank issuing the same and defendant, and that defendant is in no [31] way concerned with, and has no knowledge of, any contract between plaintiff and said defendant California & Hawaiian Sugar Refining Co.

For a further and separate answer and defense defendant alleges that there is a nonjoinder of a necessary and indispensable party defendant in said suit in that the First National Bank of Chicago, by whom said letter of credit was issued, and at whose request defendant notified said California & Hawaiian Sugar Refining Co. that it would pay drafts drawn thereunder, is not joined as a party

defendant herein, and defendant prays the same effect and advantage of these facts and things and of the nonjoinder of said First National Bank of Chicago as if it had moved to dismiss the bill of complaint because of such facts.

WHEREFORE, having thus made a full answer to all the matters and things contained in the bill of complaint herein, defendant prays that it have judgment against plaintiff for its reasonable costs and charges in this behalf, and for such other and different relief as may be meet and equitable.

Dated: December 20, 1920.

## CUSHING & CUSHING,

Attorneys for Defendant The First National Bank of San Francisco.

Service of the within and receipt of a copy thereof on the 20th day of December, 1920, is hereby admitted.

> IRA S. LILLICK, LEROY BROWN, JOHN PARTRIDGE, Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 20, 1290. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

IN EQUITY.—No. 579.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRAN-CISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation,

Defendants.

## Answer of Defendant California and Hawaiian Sugar Refining Company.

Now comes California and Hawaiian Sugar Refining Company (hereinafter for purposes of convenience called the defendant), one of the defendants in the above-entitled suit, and answering the bill of complaint therein for itself alone and not for any of the other defendants, says:

1. As to the allegation in paragraph 1 of said bill of complaint, that the plaintiff was authorized by a license issued by the United States Sugar Equalization Board prior to May 14, 1920, and in force on and after May 18, 1920, to buy and sell sugar, defendant is without knowledge. Said defendant admits each of the other allegations of said paragraph 1 of said bill of complaint.

- 2. The defendant admits the allegations of paragraph 2 of said bill of complaint. [33]
- 3. The defendant admits the allegations of paragraph 3 of said bill of complaint.
- 4. The defendant admits the allegations of paragraph 4 of said bill of complaint.
- 5. The defendant admits the allegations of paragraph 5 of said bill of complaint except in so far as it is alleged therein that the above-entitled cause is within the jurisdiction of this honorable court. Defendant denies that said cause is within the jurisdiction of this honorable court for the reasons hereinafter stated.
- 6. The defendant admits that Exhibit "A" annexed to said bill of complaint is a true copy of the contract entered into between the defendant and the plaintiff under date of May 14, 1920. Defendant further admits that said contract was dated and was executed by the plaintiff in the City of Chicago, State of Illinois, and that the plaintiff there dealt with Seavey & Flarsheim Brokerage Co. representing the defendant. Defendant denies that the said brokerage company was an agent of the defendant, but admits and alleges that it was a mere broker to negotiate sales for the defendant and to submit to the defendant for its confirmation contracts of purchase procured by it from purchasers. Defendant admits that after said contract dated May 14, 1920, had been executed by plaintiff it was sent on by said brokerage company to the defendant at the City of San Francisco, State of California, and that it was there confirmed, signed and executed by

the defendant by its duly authorized officer and agent, and that thereupon the executed copy of said contract was delivered to the plaintiff. Defendant admits that said contract contained the provisions specified in paragraph 6 of said bill of complaint. Defendant denies that said contract contained as integral parts thereof or otherwise divers conditions and restrictions or any conditions or restrictions sought to be made binding upon the buyer but being [34] for the benefit of the seller except the conditions and provisions contained in the paragraphs numbered 1 to 4, inclusive, of said contract. fendant denies that the provision in respect of arbitration contained in the paragraph numbered 5 of said contract was for the benefit of the seller alone, but, on the contrary, alleges that said provision was intended for the mutual benefit and advantage of both the buyer and seller under said contract. Defendant denies that the conditions and restrictions or any thereof contained in the paragraphs of said contract numbered 6 and 7 were for the benefit of the seller in said contract, or were included therein for any purpose except to comply with the requirements of the Attorney General of the United States of America acting through the Bureau of Investigation of the Department of Justice of the United States and the Fair Trade Commission, and in this behalf defendant alleges that the conditions and restrictions contained in said paragraphs numbered 6 and 7 of said contract were inserted in said contract and were imposed upon the buyer under said contract at the request and by the direction

of said Bureau of Investigation of the Department of Justice of the United States and said Fair Trade Commission acting in accordance with rules and regulations theretofore promulgated by the Attorney General of the United States under authority conferred upon him by law and enforce at the time of the execution of said contract, and defendant further alleges that said restrictions were and that each of them was imposed solely in the interest of the public and for the purpose of securing and procuring an equitable distribution of the sugar supply of the United States and of preventing speculation and profiteering therein by purchasers from sugar refining companies in the United States.

The defendant admits that Exhibit "B" annexed to said bill of complaint is a true copy of the contract entered into between the defendant and the plaintiff under date of May 18, 1920. [35] Defendant further admits that said contract was dated and was executed by the plaintiff in the City of Chicago, State of Illinois, and that the plaintiff there dealt with Seavey & Flarsheim Brokerage Co. representing the defendant. Defendant denies that the said brokerage company was an agent of the defendant, but admits and alleges that it was a mere broker to negotiate sales for the defendant and to submit to the defendant for its confirmation, contracts of purchase procured by it from purchasers. Defendant admits that after said contract dated May 18, 1920, had been executed by plaintiff it was sent on by said brokerage company to the defendant at the City of San Francisco, State of Cali-

fornia, and that it was there accepted in writing and signed by the defendant by its duly authorized officer agent, and that thereupon the executed copy of said contract was delivered to the plaintiff. Defendant admits that said contract contained the provisions specified in paragraph 7 of said bill of complaint. Defendant denies that said contract contained as integral parts thereof or otherwise divers conditions and restrictions or any condition or restriction sought to be made binding upon the buyer but being for the benefit of the seller except the conditions and provisions contained in the paragraphs numbered 1 to 4 inclusive, of said contract. Defendant denies that the provision in respect of arbitration contained in the paragraph numbered 5 of said contract was for the benefit of the seller alone, but on the contrary, alleges that said provision was intended for the mutual benefit and advantage of both the buyer and the seller under said contract. Defendant denies that the conditions and restrictions or any thereof contained in the paragraphs of said contract numbered 6 and 7 were for the benefit of the seller in said contract, or were included therein for any purpose except to comply with the requirements of the Attorney-General of the United States [36] of America acting through the Bureau of Investigation of the Department of Justice of the United States and the Fair Trade Commission, and in this behalf defendant alleges that the conditions and restrictions contained in said paragraphs numbered 6 and 7 of said contract were inserted in said contract and were imposed upon the buver under said contract at the request and by the direction of said Bureau of Investigation of the Department of Justice of the United States and said Fair Trade Commission acting in accordance with rules and regulations theretofore promulgated by the Attorney General of the United States under authority conferred upon him by law and in force at the time of the execution of said contract, and defendant further alleges that said restrictions were and that each of them was imposed solely in the interest of the public and for the purpose of securing and procuring an equitable distribution of the sugar supply of the United States and of preventing speculation and profiteering therein by purchasers from sugar refining companies in the United States.

- 8. The defendant admits the allegations of paragraph 8 of said bill of complaint.
- 9. The defendant admits that prior to the amendment and modification of said contracts mentioned in paragraph 8 of the bill of complaint, plaintiff in pursuance of the terms of said contracts procured from the First National Bank of Chicago, a banking corporation organized under the laws of the United States, and a citizen and resident of Illinois, and from Great Lakes Trust Company, a banking corporation, organized under the laws of the State of Illinois and a citizen and resident of the State of Illinois, certain irrevocable letters of credit authorizing defendant herein to draw on the respective banks issuing such letters specified sums aggregating the purchase price of the sugar

fixed by the said two contracts mentioned in paragraphs 6 and 7 of the bill of complaint. In this behalf the defendant alleges that a true copy of [37] the letter of credit so issued by said First National Bank of Chicago is hereunto annexed marked Exhibit "A." and is hereby specifically referred to and made a part hereof, the same as if its terms and conditions were herein fully alleged and set forth at length. Defendant further alleges that a true copy of the letter of credit so issued by said Great Lakes Trust Company is hereunto annexed marked Exhibit "B," and is hereby specifically referred to and made a part hereof the same as if its terms and conditions were herein fully alleged and set forth at length. Defendant has no knowledge in respect to the allegations of said paragraph 9 to the effect that said banks issuing said irrevocable letters of credit did so without knowledge by them or either of them of all of the terms of said contracts of May 14, 1920, and of May 18, 1920. Defendant has no knowledge concerning the terms or any terms of the separate contracts of the plaintiff with said First National Bank of Chicago and said Great Lakes Trust Company, mentioned in paragraph 9 of the bill of complaint, and is therefore without knowledge of the liability of the plaintiff to repay to said last-mentioned banks, or either of them, any sums advanced by said banks, or either of them, under said letters of credit to the defendant, or under either of them. Defendant denies that said First National Bank of Chicago and Great Lakes Trust Company are not necessary parties to

this suit, but on the contrary alleges that each of said banks is a necessary and indispensable party to said suit.

- 10. The defendant admits the allegation of paragraph 10 of said bill of complaint.
- 11. The defendant admits the allegations of paragraph 11 of said bill of complaint.
- 12. The defendant admits that each of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint herein provided for transactions in trade or commerce among the several [38] states of the United States. The defendant denies, however, that each of said contracts, or that either of them, provided for transactions or any transaction in trade or commerce with a foreign nation. defendant admits that each of said contracts relate to articles intended to be imported into the United States from a foreign country by the seller, but denies that the importation of said articles into the United States from such foreign country by the seller was dependent upon said contracts or either of them, or was to be made pursuant to said contracts or either of them. Defendant denies that each of said contracts, or that either of them, provided for the shipment of articles to the United States from Java, which is part of a foreign country, except in so far as each of said contracts provided for the sale of sugar which was in Java at the time that said contracts were respectively Defendant denies that said articles were executed. to be shipped to the United States pursuant to any provision of said contracts or of either of them, and

denies that the defendant intended to, or was required to or was to, import the said sugar so to be shipped from Java into the United States as principal of the plaintiff, or for the account of the plaintiff, except for its own account. In this behalf the defendant alleges that it had purchased in Java the sugar mentioned and referred to in each of said contracts prior to the execution of either of said contracts, and that neither the purchase nor the importation of said sugar from Java into the United States was at all referable to or dependent upon the sale by the defendant to the plaintiff of said sugar or to each or either of said two contracts of sale.

The defendant admits and alleges that in and by each of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint the plaintiff agreed that it would use the sugar covered by each of said contracts only for its own manufacturing purposes, and under no circumstances would resell said sugar, or [39] any part thereof, and that the plaintiff further agreed in and by each of said contracts that the sale of said sugar to the plaintiff should constitute the plaintiff's entire quota of sugar from the defendant from what was designated as the delivery date of said sugar under each of said contracts until the end of the year 1920. Defendant denies that said last-mentioned provisions and conditions or any thereof or that the whole or entire contract of sale between plaintiff and the defendant contained in each of said contracts of May 14, 1920, and May 18, 1920, or in

either of them, were or are or that any part of either of said contracts was or is, illegal, null or void, for the reason that the restriction therein against and the forbidding of the resale of said sugar, or any part thereof, by the plaintiff, and the forbidding of the sale by the defendant to the plaintiff of any more or other sugar in addition to the amounts and quantities specified in said two contracts of May 14, 1920, and May 18, 1920, prior to the end of the year 1920, were or are, or that either of said provisions or restrictions or any provision or restriction contained in either of said contracts was in unlawful or unreasonable restraint of trade either between the parties to said contracts themselves or in regard to the public at large. (Defendant denies that any of the provisions of said contracts or of either of them, was in any wise illegal, null or void, in any particular whatsoever.) Defendant further denies that said last-mentioned provisions of said contracts were or that either of them or any provision of said contracts was in violation of the anti-trust laws or any anti-trust law or any law of the United States forbidding contracts in restraint of trade among the several states or with foreign nations or forbidding restraint of lawful trade or free competition in lawful trade or commerce of any articles imported or intended to be imported into the United States and defendant denies that any provisions of said contracts were or that any thereof was in violation of any anti-trust law [40] of the United States or in restraint of trade or was in any particular or for any reason illegal, null or void. In this behalf the defendant alleges that each of the restrictions and conditions contained in said contracts was reasonable and proper. Defendant denies that each of said contracts of sale or either of them or the terms and conditions of said contracts or either of them. or any term or condition of said contracts or either of them was in such unreasonable or unlawful or any restraint of trade as to be at variance with or contrary to public policy or interest or unreasonable or detrimental to plaintiff or to the interest or policy of the public at large, and denies that said contracts of sale or either of them or any term or condition of either thereof was in unreasonable or unlawful or any restraint of trade in any particular. Defendant denies that any restraint of trade embodied in or affected by said contracts of sale or either of them or by the terms or conditions of said contracts or either of them or by any term or condition of either of said contracts is in unqualified or any restriction of trade in a necessary commodity dealt with in trade or commerce among the several states and denies that said contracts are, or that either of them is, or that any term or condition of either of said contracts is, for that or for any other reason, illegal or fraudulent or that said contracts or either of them or any term or condition of said contracts or either of them, effect the withholding or removing of a necessary commodity from the public market or from the public use or restraint the freedom of trade for the benefit of the public or the public interest, or created a tendency

to the maintenance of high prices of or for such necessary commodity or a monopolistic inflation or raising of prices of or for the same. In this behalf defendant alleges that the provisions in the paragraphs numbered 6 and 7 of each of the aforesaid two contracts of sale dated respectively May 14, 1920, [41] and May 18, 1920, providing that the plaintiff should use the sugars covered by said respective contracts for its own manufacturing needs and under no circumstances should resell the same and that the amount of sugar covered by said contracts should constitute the plaintiff's quota of sugar from the defendant from the delivery date of said sugar until the end of the year, were inserted in each of said contracts at the request and by the direction of the Bureau of Investigation of the Department of Justice of the United States of America and of the Fair Trade Commission, and were so inserted for the purpose of providing an equitable distribution of the sugar stock of the United States so as to restrict each manufacturer requiring sugar in any product manufactured by it to have on hand no more sugar than was reasonably necessary for its business, thereby preventing the hoarding of sugar by manufacturers or the resale by them of the quantity of sugar in excess of their requirements at exhorbitant or inflated prices and thereby preventing profiteering in sugar. this behalf the defendant further alleges that at the respective dates of the aforesaid respective contracts all contracts for the sale of sugar made by sugar refining companies in the United States to

manufacturers in the United States were required by the Attorney General of the United States, through regulations promulgated by him under authority conferred upon him by law and by the Bureau of Investigation of the Department of Justice of the United States and by other agencies of the United States Government created to conserve food supplies and to control the distribution thereof to contain provisions similar in substance and effect to those contained in the paragraphs numbered 6 and 7 of the aforesaid two contracts of sale, and that the defendant inserted said provisions in said contracts under compulsion of law and not for its own benefit or protection, and that it had no option or election to withhold said [42] provisions or any of them from the said aforesaid two contracts of sale or from either of them. In this behalf the defendant further alleges that said provisions in said contract were inserted by it under compulsion of law and for a public and not a private purpose, and that the defendant has never had any purpose or desire to enforce either of said provisions in its own interest, but, on the contrary, at all times has been and now is willing to waive either or both of said provisions in so far as they or either of them at any time have been or now are capable of waiver by the defendant.

14. The defendant denies that each or either of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint is entirely or wholly or in any wise illegal or void because they or either of them contain provisions constituting integral parts

thereof and providing that all disputes and controversies under each of said contracts should be finally settled by prescribed arbitration, extra legal in character, and the defendant denies that the effect of said provisions or of any of them was or is to oust the courts of jurisdiction. Defendant denies that said provisions of said contracts were or are or that any of them was or is contrary or inimical to the public interest or welfare.

15. The defendant denies that at or before the time of entering into said contracts mentioned in paragraphs 6 and 7 of the bill of complaint or either of them the plaintiff protested the inclusion of the terms and conditions referred to in paragraphs 13 and 14 of said bill of complaint or any thereof and further denies that the plaintiff was informed by the alleged agent of the defendant mentioned in paragraph 15 of said bill of complaint that said alleged agent was the duly authorized agent to represent the defendant with respect to said contracts or either of them and the inclusion therein of said provisions [43] mentioned in paragraphs 13 and 14 of said bill of complaint. In this behalf defendant denies that said alleged agent mentioned in paragraph 15 of said bill of complaint was in fact the agent of the defendant or was duly or at all authorized to represent the defendant in respect of said contracts of sale or either of them, except as a broker to procure an order by the plaintiff for the purchase of the sugar mentioned in said contracts. Defendant admits, however, that it would not have entered into any contract of

sale with the plaintiff for sugar which did not contain the provisions set forth in the paragraphs numbered 6 and 7 of the aforesaid two contracts of sale, for the reason that it was forbidden by the Bureau of Investigation of the Department of Justice of the United States of America and by other agencies of the United States Government acting under and by the authority of the Attorney General of the United States and created for the purpose of conserving food supplies and of controlling the distribution thereof from entering into any contract of sale with the plaintiff which did not contain such provisions or provisions of similar substance or effect, because the plaintiff was a manufacturer of candy and other confectionery, using sugar in its manufactured product, and subject to the regulations theretofore promulgated by the Attorney General of the United States and by other governmental agencies hereinbefore mentioned, imposing upon manufacturers the restrictions imposed by paragraphs 6 and 7 of said contracts

16. The defendant denies that each or either of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint was or is unilateral or without mutuality in that they or either of them gave the defendant the privilege of cancelling the contract if strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control prevented shipment or delayed delivery of the sugar covered by said contracts [44] or either of them, and further denies that each or either of

said contracts was therefore or for any other reason a nudum pactum or unenforceable.

17. Defendant denies that neither of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint provided for any date of delivery of the sugar covered thereby to the buyer f. o. b. cars San Francisco or as each of said contracts was later modified and amended, f. o. b. cars at Crockett, California, or that while each of said contracts contained provisions as to the date when shipments were to be made from Java to the United States neither contained any provisions whatever for the time of delivery of said sugar from the possession and control of the defendant to the possession and control of the plaintiff, so that each of said contracts or either of them was or is in law terminable on reasonable or any notice from one party to the other prior to the delivery by the buyer to the seller of the sugar covered thereby. In this behalf the defendant alleges that in and by the provisions of each of said contracts, both as originally executed and as later modified delivery of the sugar covered thereby was to be made to the plaintiff within a reasonable time after the sugar covered by said contracts had been received by the defendant from Java. And the defendant further alleges that in and by the respective letters of credit issued to the defendant by the two Chicago banks hereinbefore named through the procurement of the plaintiff and for its account, it was provided that the delivery of sugar covered by each of said contracts should be made not later than December 31, 1920. Defendant admits that plaintiff has given notice to the defendant of the termination and cancellation of said contracts dated May 14, 1920, and May 18, 1920, and of each of them, but defendant alleges that said attempted termination and cancellation of said contracts and of each of them by plaintiff is without any efficacy or validity and is null and void. [45]

18. Defendant denies that it has not complied with the provisions of said contract of May 14, 1920, requiring it to ship two hundred and fifty tons of sugar from Java during the month of September, 1920, and further denies that said provision of said contract was or is a material one. In this behalf the defendant admits and alleges that all of the sugar covered by said contract of May 14, 1920, was shipped from the point of shipment thereof at Sourabaya Java upon the 29th day of September, 1920, upon the Steamship "Bali" and that upon that date a bill of lading for said sugar was duly issued by the Java-China-Japan Steamship Line to which said steamship "Bali" belonged, and further that said steamship "Bali" left September 30, 1920, and thence proceeded to two other ports in Java and one in Borneo en route and that it arrived at San Francisco on November 23, 1920. Defendant admits that after said sugar was shipped from point of shipment thereof at Sourabaya, Java, on September 29, 1920, and the bill of lading therefor issued on that day by the steamship company to which the steamer on which said sugar was shipped belonged, said

steamer left the port of shipment at Sourabaya on September 30, 1920, thence proceeded to the port of Probolinggo, Java, which it left on October 4. 1920, thence proceeded to the port of Makasson, Celebes, which it left on October 9, 1920, thence proceeded to Batavia, Java, which it left on October 15, 1920, thence to the port of Balikpapan, Borneo, which it left on October 27, 1920, and that it thence proceeded directly to San Francisco at which port it arrived on November 23, 1920. In respect of the allegation that said steamship, after leaving the point of shipment of said sugar hereinbefore named, proceeded by its accustomed itinerary of voyage, the defendant is without knowledge. Defendant admits that because of the vessel carrying said sugar did not actually leave the Island of Java until well into the month of October, 1920, plaintiff has attempted [46] to rescind the entire contract of May 14, 1920, but defendant alleges that plaintiff's action in this respect is null and void, and that said attempted rescission of said contract is without effect.

19. Defendant admits that prior to the filing on the part of plaintiff herein of the bill of complaint, the plaintiff served upon the defendant at San Francisco, California, written notice advising and notifying defendant that the plaintiff had rescinded each of the contracts mentioned in the paragraphs 6 and 7 of the bill of complaint for alleged fraud and illegality and that the plaintiff treated and regarded each of said contracts as void and unenforceable and that it terminated each of

said contracts by reason of the alleged indefiniteness of the time of performance thereof by the defendant and by reason of no delivery having yet been attempted under either of said contracts and also notifying and advising the defendant that plaintiff had rescinded the entire contract of May 14, 1920, by reason of the alleged noncompliance by the defendant with the provision of said contract requiring two hundred and fifty tons of the sugar covered thereby to be shipped from Java during the month of September, 1920. In this behalf the defendant alleges that said notices were dated November 30, 1920, and were served upon the defendants on the very day upon which this suit was commenced, to wit, December 1, 1920, and defendant further alleges that no notice of similar substance, tenor or effect was served upon the defendant prior to December 1, 1920.

20. Defendant admits that sufficient sugar to include the quantity covered by the two contracts between the plaintiff and the defendant dated respectively May 14, 1920, and May 18, 1920, arrived in San Francisco by vessels arriving on November 23, 1920, and thereafter, and that the defendant notwithstanding the receipt of it of notices of attempted [47] cancellation of said contracts and of each of them served upon it by the plaintiff as set forth in paragraph 19 of the bill of complaint herein and notwithstanding the claim by the plaintiff of the illegality and voidness of said contracts and each of them, is about to tender and offer to the plaintiff all of the said sugar which has arrived

in San Francisco. Said defendant further admits that at the time of the filing of the bill of complaint herein it was about to present to the defendants, First National Bank of San Francisco and Canton Bank, the papers and documents required in and by the aforesaid irrevocable letters of credit issued by the aforesaid two Chicago banks to the defendant and was about to value on and under said letters of credit and thereby obtain payment in full of and for the 750 tons of sugar covered by said contract of May 14, 1920, and of and for the said 500 tons of sugar covered by said contract of May 18, 1920, but defendant alleges that in view of the temporary injunction heretofore issued herein it is not at the moment advised whether it shall attempt to value on or under said letters of credit by drawing on the aforesaid two San Francisco banks or either of them, or by drawing on the aforesaid two Chicago banks or either of them. The defendant, however, alleges that it is not about to obtain payment of said sugar from any of said banks so long as said temporary injunction shall continue in effect, or to do anything which it is enjoined from doing by said temporary injunction. In respect of the allegation of the bill of complaint that the defendants, The First National Bank of San Francisco, California, and Canton Bank, are upon presentation of drafts under said letters of credit accompanied by the required papers and documents, about to pay to this defendant the full purchase price of any and all or large parts of the sugar covered by said contracts of May 14, 1920,

and May 18, 1920, respectively, the defendant is without knowledge. [48]

21. Defendant admits that by reason of the provisions of said contracts requiring the plaintiff to establish the aforesaid irrevocable letters of credit, and by reason of the fact that such letters of credit have been established by the plaintiff and are still in full force and effect and are irrevocable the plaintiff is unable to stop payment of the purchase price of or for the sugar covered by said two contracts of sale under said irrevocable letters of credit by the defendant First National Bank of San Francisco, California, and Canton Bank, and defendant admits that plaintiff is unable to prevent the enforcement and carrying out by the defendant of said two contracts of sale, but defendant further denies that said contracts are or that either of them is illegal, null or void. Defendant admits that the plaintiff is unable to prevent the payment of the purchase price of the sugar covered by said contracts by said First National Bank of San Francisco and Canton Bank unless the defendant California and Hawaiian Sugar Refining Company is enjoined and restrained from receiving payment of the purchase price of said sugar under said irrevocable letters of credit and each of them, and unless the defendants First National Bank of San Francisco and the Canton Bank are enjoined and restrained from making payment of said purchase price of said sugar under said irrevocable letters of credit.

22. Defendant denies that unless an injunction be granted, plaintiff will sustain or suffer irreparable injury by being compelled if drafts are drawn under said letters of credit and are honored and paid, to at once pay to the First National Bank of Chicago and Great Lakes Trust Company the amount of said drafts which may aggregate \$555,800 or because in the event of said drafts being drawn by the defendant and valued by said banks and the amount paid therefore by said banks is paid to said banks by the plaintiff, the latter will have [49] received nothing under said contracts. In this connection the defendants denies that under the circumstances mentioned the plaintiff will have received nothing under said contracts, but on the contrary, alleges that under said circumstances the plaintiff will have received all of the sugar covered by said two contracts dated May 14, 1920, and May 18, 1920, respectively, and for which it agreed in and by said contracts to pay the amount of said drafts. Defendant further denies that unless an injunction be granted plaintiff will sustain or suffer irreparable injury because it would be necessary for plaintiff to proceed to the State of California of which it is a nonresident in order to sue the defendant at law for damages to the great or any annoyance or expense of plaintiff or because the loss of the use of the sums of money covered by said letters of credit would seriously or at all jeopardize the plaintiff's financial strength during the pendency of an action to recover damages, or because in such action to re-

cover damages, defendant could or might contend that in so far as plaintiff's right of action depended on claims by it that said contracts of May 14, 1920, and May 18, 1920, or either of them was illegal or contrary to public policy, such action for recovery of damages could not be maintained by plaintiff for the reason that on the part of the defendant the contract was executed or because a court of law would not lend its aid to recover back money paid under a contract illegal or contrary to public policy, or because the defendant might or would contend that in so far as such right of action of the plaintiff for damages depended on claims by it that each of said contracts or either of them was nudum pactum or terminable by plaintiff on reasonable notice the procuring of issuance of letters of credit by which payments were effected, was the result of a mistake of law by plaintiff which would preclude recovery of damages sustained by it as a result of payments of [50] the purchase price fixed by said two contracts of May 14, 1920, and May 18, 1920, or either of them. In this behalf defendant denies that either of said contracts dated May 14, 1920, and May 18, 1920, respectively, is or was illegal or contrary to public policy or was a nudum pactum or terminable by plaintiff on reasonable or any notice. Defendant further denies that unless the injunction prayed for herein be granted plaintiff may be subjected to great or any loss or damages or be without any redress or relief whatever on

account thereof, and further denies that plaintiff is without recourse save in a court of equity.

23. Defendant denies that if notice of application for a temporary restraining order had been given to the defendants or particularly to this defendant plaintiff would have suffered immediate or irrevocable or any loss or damage before the matter could be heard by this Honorable Court on notice because of the or any of the matters or things alleged in paragraph 23 of the bill of complaint, or for any other reason

For further and separate answer and defense, defendant alleges that said two contracts are. and that each of them is, separate and distinct from each of the irrevocable letters of credit in said bill of complaint referred to; that said contracts are, and each of them is, a contract of sale between plaintiff and defendant; that of said irrevocable letters of credit,—of which there are two,-each is a contract made by the bank issuing it with this defendant and the holders of drafts to be drawn in reliance on said letter of credit, the terms of said respective letters of credit providing for the payment of drafts drawn in accordance with their provisions; and such irrevocable letters of credit are entirely distinct, and each of them is entirely distinct, from said contracts, [51] or either of them, except in the matter of the quality, character, kind and test of the sugar involved in the contracts of sale, and there is no dispute made by plaintiff in its bill of complaint, or at all, or any contention, as to any defect in the quality, test, grade, standard or character of such sugar involved, and these points are not in issue herein; and that as to all other terms the said contracts and the said irrevocable letters of credit are absolutely dissimilar and have nothing in common, and, where they have points in common, it is admitted by plaintiff that there can be no dispute.

And this defendant further alleges in this regard that it has the right to demand and here requires the performance of the obligations of said letters of credit as by the contracts of said letters of credit provided and without regard to any alleged nonperformance of said contracts of sale or either of them by said defendant and without regard to any question of construction of the legality of said contracts of sale or either or them.

For further and separate answer and defense defendant alleges and shows that on the 14th day of May, 1920, and on the 18th day of May, 1920, and for a long time before and after said dates last named, this defendant was acting under license to do business as a refiner of sugar duly issued by the authority of the United States Food Administration, and not withdrawn, but still in force at the date of said contracts after the powers and duties of the Food Administrator, Mr. Herbert Hoover, were transferred by proclamation of the President to the Attorney General of the United States; that the Act of Congress under which the powers of the President in the conditions of emergency and stress consequent upon the Great

War in Europe and the right to issue said license were derived, is entitled, "An Act to provide further for the National Security and Defense by encouraging the [52] production, conserving and supply, and controlling the distribution of food products and fuel"; that this act was approved on the 10th day of August, 1917, and is hereby referred to in every particular and for every purpose precisely as if it had been inserted in all its terms herein.

That on the same day of the adoption of the said act, to wit, the 10th day of August, 1917, the President of the United States, by executive order or proclamation duly made and given, created and provided for the United States Food Administration, and appointed Herbert Hoover United States Food Administrator; that the powers given to said Food Administrator and to the said United States Food Administration are clearly set forth and referred to in said executive order or proclamation, and that sugar was one of the foods included in and provided for in said executive order or proclamation; that on the 7th day of September, 1917, the President duly issued his proclamation declaring that all persons, firms, corporations and associations engaged in the business either of importing sugar, or of manufacturing sugar from sugar-cane or beets, or of refining sugar, and others, were required to secure on or before October 1st, 1917, a license to do business under such rules and regulations as might be prescribed; and provided further that application for such license should be made

to said United States Food Administrator at Washington, D. C., upon forms prepared by him for such purpose; that as soon thereafter as possible this defendant duly applied for and obtained such a license and was acting under the same at the date of each of the said contracts of sale; that one of the conditions of obtaining said license was, that in the event of the breach of any of the rules of the Food Administration applying to its business such license could be revoked, and during such period of revocation this defendant would not be allowed to do business as a refinery; that amongst the rules and regulations [53] of said Food Administration was what is known as "Rule 6," governing refiners like this defendant, which was fully known to and understood by this defendant at all times herein mentioned and which is as follows:

"Rule 6. RESALES WITHIN SAME TRADE PROHIBITED, WHEN—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade, without unreasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice."

That this Rule 6 was in full force and effect and was known to, and respected by, this defendant in making and executing said two contracts with plaintiff.

That this defendant was required by its understanding of said Rule 6 to prevent the breach of said Rule by any of its customers to whom it sold sugar, and to that end and in accordance with the requirements of the Department of Justice, as hereinafter set forth, inserted a proviso in its contracts with said plaintiff requiring the observance of said Rule, and this defendant realizes and believes and was so advised that as a matter of law the right of the United States Food Administration to require and force the issuance of said license gave to said Food Administration the right to dictate clauses in all contracts made by this defendant for the sale of the sugar, such clauses to be so dictated in the interests of observing the requirements of the Food Administration and the purposes of said Act of Congress and proclamations or executive orders of the President; that on the 23d day of August, 1917, the Attorney General of the United States, considering generally the authority of the United States Food Administrator under such Act of Congress to enter into agreements with persons in various trades and industries which if made between private traders would violate the Sherman Anti-Trust Act adopted by Congress on the 2d day of July, 1890, announced as [54] his opinion that such agreements made through the Food Administrator acting by direction of the President under authority of section 2 of said Act of Congress first hereinabove referred to and having reasonable relation to the objects enumerated in section 1

of said act, that is to say, to assure an adequate supply of equitable distribution of necessaries and to maintain and establish governmental control of necessaries during the War, would not fall within the operation of the Sherman Anti-Trust law even though the effect of such agreement might be to affix a uniform price or to establish a pooling of output, this letter concluding with these words: "For, when natural laws of trade can no longer be depended upon to regulate markets, the only choice is between artificial control imposed by private interests and artificial control imposed by public agencies. In these circumstances, therefore, such governmental action, so far from running counter to the purpose of the Sherman law, is directly in line with it." This letter of the Attorney General is referred to in "Opinions of Attorney General," Vol. 31, page 376, and this defendant further alleges that said opinion of the Attorney General was fully known to and understood by this defendant on the dates of said two contracts, and is hereby referred to for every purpose herein.

That on the 21st day of November, 1919, the President provided by proclamation that the powers theretofore vested in the United States Food Administrator under the authority of said Act of Congress first herein referred to and by executive orders or proclamations issued thereunder in so for as they might apply to foods, other than wheat and wheat products, should thereafter be exercised by the Attorney General of the United States, to whom was given power by said proclamation last

referred to to supervise, direct and carry into effect the provisions of said Act of Congress first herein referred to, together with all [55] the powers, rights and duties theretofore vested in said Food Administrator, including the right to issue, regulate and revoke, in the name of the Attorney General of the United States, licenses such as the one hereinbefore referred to as having been issued by the Food Administrator to this defendant, and that said proclamation last named further provided as follows:

"All licenses and revocations of licenses and all regulations now in force, so far as the same apply to foods, feeds and their derivative products other than wheat and wheat products, shall continue in force until altered or repealed by the Attorney General,"

and that prior to the date last-named there had been issued to this defendant by the United States Food Administration, through Herbert Hoover, United States Food Administrator, a License, dated October 3, 1917, to import, refine and manufacture sugar, and that this license was in force on the date last named, and has never been revoked; and, furthermore, this defendant asserts that said Rule 6, hereinbefore referred to, was a Rule or Regulation of said United States Food Administration by the proclamation last referred to and was automatically continued in force and remained in force as a matter of fact until long after the dates of said two contracts subject of this action.

That furthermore, pursuant to said powers so transferred from said United States Food Administrator to the Attorney General of the United States by said proclamation last referred to, Howard Figg, Special Assistant to the Attorney General and acting for him, addressed a letter to the American Sugar Refining Company at New York City, under date of April 29th, 1920, with special reference to Rule 6 and its continuance in force, in words and language as follows:

## "DEPARTMENT OF JUSTICE. WASHINGTON, D. C.

April 29, 1920.

The American Sugar Refining Company, New York City. [56] Gentlemen:

It was very clearly established at the conference held by me with representatives of the various eastern sugar refiners on April 26, that speculation and resales within the trade were very largely responsible for present unequal distribution and exorbitant prices. The refiner can very definitely help in relieving this situation by circularizing his trade to the effect that he will distribute to regular customers only, and will refuse to accept any export and toll business except where contracts are now in existence; and he would feel justified in excluding from participation in future allotments any customer who is believed to have sold to speculative buyers.

I shall insist upon a strict enforcement of Rule 6, of the Special License Regulations, which pro-

hibit resales within the trade. I herewith quote for your information, as well as for that of your trade, this rule:

'Resales within same trade prohibited, when—The licensee, in selling food commodities, shall keep such commodities moving to the customer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.'

I hope that you will give this matter your immediate consideration, sending me a copy of your letter to your regular customers.

Yours very truly,
(Signed) HOWARD FIGG,

Special Assistant to the Attorney General."

And this defendant further alleges that although said letter last cited was addressed to the American Sugar Refining Company, by its terms it nevertheless applied to all refiners of sugar in the United States, and was general in its language, and it served to reiterate and emphasize, as an example of the attitude of the office of the Attorney General of the United States on the subject of resales, Rule 6 of the original rules and regulations of the United States Food Administration; and it will be borne in mind that this letter last referred to was dated fifteen days before the date of the first of said contracts between this defendant and plaintiff hereinbefore referred to, and this defendant

further alleges that its action in inserting said clauses 6 and 7 in said contracts was in direct performance of the intention and purpose of the Department of Justice of the United States through its Attorney General acting under the [57] powers and duties of said proclamation of the President dated November 21, 1919, hereinbefore referred to.

That on and before the said 14th day of May, 1920, and on and before the 18th day of May, 1920, there was in existence in the City and County of San Francisco, State of California, an agency of the Department of Justice organized and instituted by the Attorney General of the United States, known as the Bureau of Investigation, whose purposes were to investigate food prices and transactions in the sale of food and food supplies including sugar, and that this defendant was constantly and often visited by the agent of said Bureau of Investigation at San Francisco with reference to its transactions in sugar; that also on said dates of said contracts there was in existence in San Francisco an organization known as the Fair Trade Commission composed of residents of the City and County of San Francisco and vicinity, and whose chairman was H. Clay Miller; that said H. Clay Miller was designated by the Attorney General of the United States, under the general powers and authority granted him as aforesaid by the President, as such chairman, and was requested by him to name and designate and form his own organization by selecting and appointing the other members of said Fair Trade Commission, in pursuance of which he did so select and appoint the following persons to act with him, to wit: Milton H. Esberg, John A. Britton, John R. Hanify, R. B. Hale, E. S. Heller, Mrs. Aaron Schloss and Mrs. Helen M. Knight.

And this defendant further alleges that prior to entering into said two contracts with plaintiff it was in constant communication with said Bureau of Investigation and with said Fair Trade Commission in reference to the price at which it would be allowed to sell Java White Sugars imported by it from Java, and especially such sugars as it was at that time about to sell to said plaintiff, and that all its acts in connection with its said [58] contracts with said plaintiff were understood and advised upon by said Bureau of Investigation, and said Fair Trade Commission, and that it was at the request and by the direction of said Bureau of Investigation, approved by said H. Clay Miller as Chairman of said Fair Trade Commission, that said two clauses, six and seven, were inserted in said contracts, and the same were required by the said Department of Justice; that in all matters leading up to the execution of said two contracts this defendant was acting under the advice and consent of and by the direction of and in full confidence towards said Department of Justice and the powers given, as hereinbefore set forth, to the Attorney General of the United States in the premises, and that this defendant well knew that because the Attorney General of the United States had the power to revoke its said license to do States, or his agencies or agents, had also the power, as hereinbefore stated, to dictate the terms and requirements of any contract that it might make for the sale of its sugar, and that at all times herein referred to this defendant believed it was acting in strict regard to its duties as a citizen in observing the requirements of the Government through the Attorney General of the United States succeeding the United States Food Administrator, as above set forth, and that the insertion of said clauses was not a voluntary act of this defendant, but the directed act of the Department of Justice cheerfully concurred in by this defendant as an obedient citizen.

That, in view of the contents of the aforesaid letter dated August 23, 1917, of the Attorney General of the United States, an extract from which is hereinabove given, declaring the nonviolation of the Sherman Anti-Trust Act by contracts made between producers and traders of the United States and the Food Administrator, fixing food prices in the United States, and in view of the powers transferred to and exercised by the Attorney General of the United States, as hereinabove set forth, and in view of the said letter of Howard Figg, representing said Attorney General of the United States, to the American Sugar Refining Company, dated April 29th, 1920, set forth hereinabove in full, this defendant, in entering into said contracts, did not deem it was in any wise violating any law or any Act of Congress of the United

States, especially the Sherman Anti-Trust Act, and contends now that there was no violation of said Sherman Anti-Trust Act by anything that it has done or that has been done in connection with said contracts or either of them.

For a further and separate answer and defense defendant also alleges and shows this Court that the President of the United States by proclamation dated the 13th day of October, 1920, and effective the 15th day of November, 1920, pronounced and declared that licenses with respect to sugar to the refiners and others were no longer essential and that license regulations under said licenses or proceeding therefrom were cancelled by said proclamation and declared of no effect and void; and this defendant contends that automatically the said clauses 6 and 7 of said contracts became on the date last mentioned of no effect and void; that the action herein was begun on the 1st day of December, 1920, complaining of the illegality of said contracts by reason of the insertion of said two clauses, when at that very time said clauses were of no effect and void by reason of the Presidential Proclamation last referred to, and this defendant respectfully refers to said proclamation for every purpose in connection herein.

That as this defendant is informed and be lieves and therefore alleges, said defendant on the above dates of said contracts, was also under license similar to that of this defendant, and issued by similar authority, and could at any time [60] have petitioned to the Attorney General of the United States or to competent authority in Washington for permission to make resales that were prohibited by said clause 6 of said contracts, and said plaintiff could have rested its case in this regard with the Attorney General of the United States, who would presumably have issued permission to make a resale at any time had it been consistent with his duties and powers so to do, and that in so far as this defendant is informed and believes, and therefore alleges, no application for the right so to resell was ever made by said plaintiff to anyone.

For a further and separate answer and defense, the defendant alleges that there is a nonjoinder of necessary and indispensable parties defendant in said suit in that the First National Bank of Chicago and the Great Lakes Trust Company, the two Chicago Banks which the plaintiff, as required by its two contracts with the defendant dated May 14, 1920, and May 18, 1920, respectively, procured to issue to the defendant the letters of credit upon which the plaintiff seeks to enjoin the defendant from valuing and against which it seeks to prevent the defendant from drawing or presenting drafts are neither of them joined as a party defendant herein and the defendant prays the same effect and advantage of these facts and things and of the nonjoinder of said First National Bank of Chicago and said Great Lakes Trust Company, as if it had moved to dismiss the bill of complaint because of such facts.

For a further and separate answer and defense, the defendant alleges that it appears upon the face of the bill of complaint by plaintiff's showing that it is not entitled to the relief prayed for against the defendant or to any relief arising from the facts alleged in said bill of complaint, and the defendant [61] prays the same benefit and advantage of these facts and things as if it had moved to dismiss the bill of complaint because of such facts.

For a further and separate answer and defense, the defendant alleges that it appears from the face of said bill of complaint that the same is wholly without equity and the defendant prays the same benefit and advantage of this fact as if it had moved to dismiss the bill of complaint because of it.

For a further and separate answer and defense, the defendant alleges that it appears upon the face of said bill of complaint that plaintiff has a plain, adequate and complete remedy at law in respect of the matters complained of by it in said bill of complaint and the defendant prays that it may have the same benefit and advantage of this fact as if it had moved to dismiss the same bill of complaint because of it.

For a further and separate answer and defense the defendant alleges that on May 14, 1920, the date of the first of the two contracts mentioned in the bill of complaint, the market price of sugar of the quality and grade covered by said contract was \$.213/4 per pound, which was almost two cents

per pound higher than the price specified in said contract, to wit: \$.1985 per pound; that on May 18, 1920, the date of the second said contracts of sale, the market price of sugar of the quality and grade covered by said second contract was \$.231/2 per pound, which was more than three and one-half cents per pound higher than the price specified in said contract, to wit: \$.1985 per pound. Defendant further alleges that since the execution of the latter of said two contracts the market price of sugar has steadily fallen, so that on November 30, 1920, and on December 1, [62] 1920, said market price of sugar of said quality and grade was only eight cents per pound, and on December 17, 1920, was only seven and one-half cents per pound. Defendant further alleges that the plaintiff did not notify the defendant of any claim by it that said contracts were, or that either of them was, null or void, or illegal, or incapable of rescission of cancellation by the plaintiff by reason of any of the matters or things alleged in the bill of complaint herein, or for any reason whatsoever, until it did so by notice dated November 30, 1920, and served upon the defendant the very day upon which this suit was commenced, to wit: December 1st, 1920. On the contrary, defendant alleges that at all times after the execution of said respective contracts and up to December 1, 1920, the plaintiff affirmed and ratified said contracts in all respects, and that as late as September 2, 1920, the plaintiff requested the defendant to postpone until November 1920, shipment from Java of such of the sugar covered

by said contracts as it was therein provided should be shipped from Java in September 1920, and to postpone until December, 1920, the shipment from Java of such of the sugar covered by said contracts as it was therein provided should be shipped from Java in October, 1920.

Defendant further alleges that if said plaintiff had informed the defendant directly after the execution of said two contracts respectively or within a reasonable time thereafter of its claim that said contracts were or that either of them was illegal or void or terminable or capable of rescission by plaintiff on account of any of the matters or things alleged in the bill of complaint herein, the defendant, if it had acquiesced in said claim, and cancelled said contracts and released the plaintiff from the obligation thereof, might have resold the sugar covered by said two contracts without suffering any great loss or damage, but defendant alleges that the plaintiff willfully and intentionally [63] failed to make any claim to the defendant of the invalidity of said contracts or of either of them, or of the plaintiff's right to cancel or rescind said contracts, or either of them, by reason of any of the matters or things alleged in its bill of complaint until delivery under said two contracts was about to be made, at which time the market price of sugar was so low that a cancellation or rescission of said contracts by the plaintiff at that time and a sale of the sugar covered thereby by the defendant would involve a loss to the defendant of more than \$300,000.00.

The defendant further alleges that the failure of the plaintiff to make any claim of the invalidity of said contracts of sale, or of either of them, or of its right to rescind said contracts or either of them was due to the fact that plaintiff did not wish to cancel or rescind either of said contracts so long as there was any possibility of the market price of sugar rising to the price fixed in and by said contracts of sale, so that plaintiff might have the benefit of said contracts in the event that the price fixed therein was below the market price of sugar of like quality and grade at the time of delivery of said sugar; and the defendant further alleges that the only reason that the plaintiff now claims that said contracts are, or that either of them is, invalid or seeks to rescind or cancel said contracts, or either of them, is that the market price of sugar of the quality and grade specified in each of said contracts is now more than twelve cents per pound below the price fixed in each of said contracts; and defendant further alleges that if the market price of sugar of the quality and grade specified in said contract was now equal to or greater than the price fixed in said contracts. the plaintiff would not be claiming that either of said contracts was or is illegal or null or void for any reason whatsoever, and would not be claiming the right to rescind the said contracts or either of them. [64]

Defendant further alleges that the plaintiff, by reason of its acquiescence in the said contracts and in their validity at all times after the execution of said contracts until December 1, 1920, and by reason of its failure to promptly claim a right to rescind or cancel said contracts so as to permit the defendant to sell the sugar covered by said two contracts without great loss or damage to said defendant in the event that it agreed to a rescission or cancellation of said contracts, has disentitled itself to equitable relief, and is estopped to claim or contend that said contracts are, or that either of them is, illegal or void or terminable or capable of rescission by the plaintiff by reason of any matter or thing alleged in the bill of complaint, or for any other reason.

For a further answer, and by way of counterclaim, this defendant alleges that in and by the order of temporary injunction made by this Honorable Court on December 8, 1920, it was and is provided that First National Bank of San Francisco and Canton Bank, defendants herein, and the First National Bank of Chicago, and Great Lakes Trust Company, might pay to Walter B. Maling, Special Master appointed by said order of temporary injunction as depositary for that purpose, the amount of any and all drafts which might be presented by the defendant to either of the four above-named banks under and pursuant to the two letters of credit mentioned in said order of temporary injunction and heretofore issued to the defendant by said First National Bank of Chicago and Great Lakes Trust Company; and defendant further alleges that on December 17, 1920, it presented to the First National Bank of San Francisco a draft

drawn on First National Bank of Chicago under and pursuant to the aforesaid letter of credit issued to said defendant by said last-named oank. which said draft was by its terms payable to the order of defendant and was for the amount of [65] \$111,160.00, and that said draft so drawn and presented was accompanied by a bill of lading in respect of 250 tons of the sugar covered by the aforesaid contracts between the plaintiff and the defendant, and by the other documents in due form required by the terms of said letter of credit; and the defendant further alleges that it is its intention to draw and present under and pursuant to the aforesaid letters of credit and each of them drafts for the balance of the purchase price of all sugar covered by said two contracts of sale as fast as the balance of said sugar covered by said contracts can be loaded on railroad cars and bills of lading therefor are duly and property issued.

WHEREFORE, having thus made a full answer to all of the matters and things contained in the bill of complaint herein, said defendant prays that the plaintiff herein be denied any relief by this Honorable Court, and that its bill of complaint be dismissed, and further, that by the final decree herein it be adjudged and determined that the defendant is the owner of all moneys which during the pendency of this suit may be paid to the aforementioned Special Master by any of the four banks above named, on account of any and all drafts drawn and presented against said banks or any of them, under

and pursuant to the aforementioned letters of credit issued by said two Chicago banks, to the defendant, and that said Special Master be by said decree ordered and directed to pay to the defendant all such moneys received by him; further, that the defendant have judgment against the plaintiff for its reasonable costs and charges in this behalf most wrongfully sustained; and for such other and different relief as may be meet and just and in accordance with equity.

Dated: December 17, 1920.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian Sugar Refining Company. [66]

# Exhibit "A." ORIGINAL.

\$300,000

Capital and Surplus, \$22,000,000.00

No. G. C. A6385-

\$300,000.00 (U. S. Currency)—

THE FIRST NATIONAL BANK OF CHICAGO.

Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco, Calif.

#### Gentlemen:

We hereby authorize you to value on The First National Bank of Chicago at .... sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each) 99 test 25 Dutch Standard © \$19.85 per 100 lbs. F. O. B. San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920.

The Bills of Lading must be issued to the order of Shippers' and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before December 31, 1920, and the advice thereof (in duplicate) sent to The First National Bank of Chicago accompanied by Bill of Lading and abstract of Invoice, on receipt of which Documents the Bills will be duly honored.

We hereby agree with drawers endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago.

This credit is confirmed and irrevocable.

#### Insurance --

Drafts under this Credit must bear upon their face the words:

Drawn under The First National Bank of Chicago.

Credit No. G. C. A6385, dated June 2, 1920.

Respectfully Yours,
C. P. CLIFFORD, V.-P.

If desired, drafts drawn under this credit will be paid at the counter of the First National Bank, San Francisco, Calif.

[In margin:] Countersigned:

W. G. STRAND, A. Mgr.

[Stamped across face:] ORIGINAL. [67]

#### Exhibit "B."

### GREAT LAKES TRUST COMPANY.

Harry H. Merrick, President
James C. Johnson, Vice President
John W. Thomas, Vice President
Raymond R. Phelps, Vice President
Charles C. Willson, Vice President
William A. Nicol, Cashier
Everett L. Augustus,
Assistant Cashier Roy J. Birkle, Assistant Cashier

William F. Roberts, Mgr. Bond & Investment Dept. Nathan G. Chatterton, Mgr. Foreign Dept. Tillie S. Frankenthal, Mgr. Special Service Dept.

Vallee O. Appel,
Mgr. Trust Dept.

Alan S. Wallace,
Secy. & Mgr. New Business Dept.

Ralph E. Zuck,
Mgr. Savings Dept.

Capital Stock, \$3,000,000 Surplus, \$600,000 110 So. Dearborn Street, Chicago, Ill.

June 1. 1920.

California & Hawaiian Sugar Refining Co., San Francisco,

California.

OUR COM'L CREDIT No. 1073.

#### Gentlemen:

For account of the Continental Candy Corporation of Chicago we hereby authorize you to draw on this bank at sight up to an amount not exceeding \$255,800.00 (two hundred fifty five thousand eight hundred dollars) to cover Dutch standard 25 refined sugar 99% test, to be shipped from Java during September and/or October, 1920.

Your drafts are to be accompanied by plain invoices in triplicate and clean railroad bills of lading to order of shippers and blank endorsed, showing shipment from San Francisco to Chicago—the price to be \$19.85 per 100 lbs. F. O. B. San Francisco.

This credit will remain in force until December 31, 1920, and all drafts must be drawn and negotiated on or before that date.

We hereby agree with the makers, endorsers and bona fide holders of all drafts under and in compliance with the terms of this credit that such drafts shall meet with due honor on presentation at our bank.

Yours very truly,
JOHN W. THOMAS,
Vice-President.

# N. G. CHATTERTON,

Manager, Foreign Department.

P. S.—Drafts under this credit may be negotiated, if desired, with the Canton Bank of San Francisco.

N. G. C. Mgr. [68]. Receipt of a copy of the within answer this 17th day of December, 1920, is hereby admitted.

IRA S. LILLICK,
CHAS. LEROY BROWN,
JOHN S. PARTRIDGE,
Attorneys for Plaintiff.
CUSHING & CUSHING,

Attorneys for Defendant The First National Bank of San Francisco.

H. U. BRANDENSTEIN, Attorney for Defendant, Canton Bank.

[Endorsed]: Filed Dec. 17, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

# Oath of Office of Special Master.

I, Walter B. Maling, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of Special Master in the above-entitled suit. SO HELP ME GOD.

### WALTER B. MALING.

Subscribed and sworn to before me this 22d day of December, 1920.

[Seal] J. A. SCHAERTZER, Deputy Clerk U. S. District Court, Northern District of California. [Endorsed]: Filed Dec. 22, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

In the District Court of the United States in and for the Northern District of California, Southern Division.

# 579—EQUITY.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA & HAWAIIAN SUGAR REFIN-ING CO., a Corporation, THE FIRST NA-TIONAL BANK OF SAN FRANCISCO, California, a Corporation, and CANTON BANK, a Corporation,

Defendants.

# (Opinion.)

On May 14, 1920, plaintiff Candy Company entered into a contract with defendant Sugar Company for the purchase of 750 long tons of white Java sugar. The contract contained the following provisions:

"1. The California & Hawaiian Sugar Refining Co., of San Francisco, have today sold, and the Continental Candy Corporation of Chicago, Illinois, have today bought the following sugars:

"750 tons, each, 2,240 lbs. 10% more or less, White Java sugar at 19.85, net cash, duty paid,

landed weights, F. O. B. cars San Francisco, California: 25 Dutch Standard—99 Polarization.

"250 tons, 10% more or less, shipment from Java September, 1920.

"500 tons, 10% more or less, shipment from Java October, 1920.

- "2. PAYMENT. Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. in the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.
- "3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.
- "4. Any change of import duty understood to be for account of buyer.
- "5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.
- "6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

"7. Sales of this sugar to manufacturers constitutes their quota [71] of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year."

Four days later, a similar contract between the same parties for the purchase and sale of five hundred additional tons of sugar was entered into.

At the time of these purchases the price of sugar in the market had been rising for some time and was then in the neighborhood of 22c per pound. It continued to rise until about the middle of July when a steady decline ensued. By the latter part of October, it had reached  $11\phi$  per pound and on the day the bill of complaint was filed herein, December 1, 1920, it had fallen to  $8\phi$  per pound. By December 17, the day answer was filed, it had fallen to  $71/2\phi$  per pound.

Pursuant to the provisions of paragraphs 2 of the contracts, irrevocable letters of credit, expiring December 31, 1920, were established by the Candy Company—\$300,000 with defendant First National Bank, and \$255,800 with defendant Canton Bank.

On December 1, plaintiff filed its bill of complaint alleging the making of the contracts referred to and the establishment of irrevocable letters of credit and that plaintiff would in due course be bound to repay any sums advanced in payment of sugar delivered pursuant to the terms of the irrevocable letters of credit. Plaintiff further alleged that both of the entire agreements between plaintiff and defendant were illegal, null and void,

because the clauses forbidding the resale of the sugar and establishing plaintiffs quota were in unlawful and unreasonable restraint of trade and in violation of the anti-trust laws.

It was further alleged that plaintiff, for the reasons given, had rescinded the contracts and duly notified the Sugar Company thereof. Alleging the arrival and probable immediate delivery of said sugar, with consequent demand on, and payment by, defendant banks of the sums represented by the irrevocable letters of credit, to plaintiff's irreparable damage in the premises, the prayer was for a restraining order enjoining the tender or delivery of the sugar, [72] the negotiation or payment of either of the irrevocable letters of credit, and for a decree declaring the contracts "illegal, null and void, cancelled, and rescinded" and for a permanent injunction, etc., etc.

A temporary restraining order was issued, and by agreement the matter came on for final hearing on the merits on December 27. The substantial issues tendered by defendants were to the effect that the clauses in the contracts numbered 6 and 7, specifically objected to by plaintiff, did not suffice in any respect to operate in unreasonable or unlawful restraint of trade or to violate the anti-trust laws or to invalidate the said contracts; and that said clauses were inserted in said contracts because of the general requirement to that end, made by the Attorney General of the United States acting through the Department of Justice and the Fair Trade Commission, and were imposed solely in the

interest of the public and for the purpose of securing and effecting an equitable distribution of sugar and preventing speculation and profiteering therein. The contention was also made that the clauses were severable if found invalid.

Defendant Sugar Company also alleged that it had no notice of plaintiff's claims that the contracts were void, as being in restraint of trade, etc., until December 1, the day on which notice of rescission was served and the bill of complaint was filed; and that if plaintiff had notified it of the asserted invalidity of the contracts within a reasonable time subsequent to their execution, and it had acquiesced in such invalidity, a resale of the sugar, at a small loss to defendant, might have resulted: but that plaintiff had delayed advising defendant of its attitude and claims until the price of sugar had fallen so low that a cancellation or rescission of the contracts, as prayed for by plaintiff, would result in a loss to defendant of a sum in excess of \$300,000. [73]

The principal argument in the case centered around the asserted invalidity of paragraph 6, forbidding a resale of the sugar purchased.

- CHARLES LEROY BROWN, IRA S. LIL-LICK and JOHN S. PARTRIDGE, of San Francisco, Attorneys for Plaintiff.
- CUSHING & CUSHING, of San Francisco, Attorneys for Defendant First National Bank.
- H. U. BRANDENSTEIN, Esq., of San Francisco, Attorney for Defendant Canton Bank.

DONALD Y. CAMPBELL and GARRETT W. McENERNEY, of San Francisco, Attornevs for Defendant California & Hawaiian Sugar Refining Co.

BLEDSOE, District Judge. (After Reciting Facts as Above).—This sugar was bought in time of war—war still existing legally, if not actually; we were surrounded and hampered by all of the emergencies and efforts growing out of the war and the resultant determination on our part to see that the war program was brought to a successful conclusion, plus the further exigencies and perhaps inconsistencies arising from our intensive efforts to effect some sort of a satisfactory readjustment from our participation in the war.

This contract then is to be weighed and tested, not by what might have been the situation in the year 1913 before the war began, or not what might be the situation years hence, when the immediate economic effects of the war shall have passed into history, but what the situation was in the spring and summer of 1920,—a period of uncertainty, insufficiency, readjustment and rehabilitation.

The Sherman Anti-Trust has recently been given very careful consideration by me in proceedings instituted by the government against the California Associated Raisin Company, and I have given it the best thought I could under the circumstances obtaining. I confess that you can read certain decisions emanating from the most exalted tribunal in the world, respecting the Sherman Anti-Trust Act, and then you can read other decisions emanating from the same tribunal, [74] and if you are only human you may be led to assert that they do not always seem to be consistent one with another.

But, aside from all other considerations, taking the decisions in the Tobacco case (221 U.S. 106), the Standard Oil case (221 U.S. 1), the Trans-Missouri case (166 U.S. 290), the Keystone Watch case (218 Fed. 502), and even the Steel Trust case of last spring (U. S. Sup. Ct. decided March 1, 1920), as I read them and as I now recollect them (recalling particularly the emphasis with which Mr. Justice Harlan dissented in some of those cases, and the growing vehemence with which he indicated that the Supreme Court was reading into that law that which Congress had definitely and deliberately refused to incorporate into it, to wit, "The rule of reason")—taking all those cases into consideration, giving the latest expressions paramount weight, and endeavoring to arrive at the proper path to be travelled by us in the construction of the Sherman Anti-Trust Act, it seems to me that this much clearly lies within the realm of legal indispute: regardless of the precise and definite and seemingly controlling language of the statute, as the same has been read here this morning, the Supreme Court of the United States, which is really the final arbiter of our destinies in this country, has said that a contract in restraint of trade, to be within the prohibitions of the Sherman Act, must not only be in restraint of trade, but it must be so unreasonably—to an unreasonable degree.

The only way, or at least one of the most satisfactory ways by which you can determine what is the reasonableness or unreasonableness of the restraint put upon trade by a contract, is to consider the motive, extent and effort of the contract, consider the circumstances under which it was made, consider what the parties had in mind, what motives served to move them to the various ends [75] they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effects, unreasonable, in its restraint upon the free flow of the commerce involved. So measured and tested, if it be unreasonable in its restraints upon trade, it lies within the prohibitions of the Sherman law; if not, that law has no concern with it.

It is common knowledge, I think, that during the war, and during the period subsequent to the actual cessation of hostilities, the question of the price, and the distribution, and the allocation of sugar in the United States, had attained to a great deal of importance; it was a question that occasioned considerable thought. I know that the exertions and the ramifications of the Department of justice had been multitudinous and of wide extent with respect to what should be done about the sugar question, as well as how it should be done. In my own court, during this very year, there have been at least two prosecutions under indictment, for the sale of sugar, both of them anterior to the transaction involved here, and having to do with the

alleged unlawfulness of the sale of sugar, at prices other than those fixed by governmental authority; one case, in which there was a conviction, because the defendants evidently were endeavoring to profiteer upon that necessary of life; in the other case there was an acquittal because, though the sugar had been sold at an advanced price, in excess of the price fixed by the controlling agency, there was lacking that intent sufficient to make it a criminal transaction, as the jury evidently viewed it. I call attention to these occurrences merely to indicate that there was a great deal of concern being manifested, publicly and privately, with respect to how sugar might be dealt with, to whom it might be sold, under what circumstances it might be delivered to this, that and the other place, and the prices which might lawfully be exacted [76] for it.

I know that down in Los Angeles—and I am assuming that the same conditions obtained here in San Francisco—for a long time sugar was sold only in small packages; you could get only one or two pounds at a time, and that, only with a stated amount of other groceries. I know that I have made more than one journey to the grocery store, at the behest of my wife, to buy a lot of other things we did not need—at least at the moment—in order that we might become possessed of a sufficient amount of sugar to satisfy the requirements of the day. So that everybody clearly understood that the existence of extraordinary conditions in the matter of the sugar supply made necessary the

imposition of extraordinary restrictions; and whether it was lawful or unlawful, whether the Government had the power to impose these restrictions and enforce them, or not, whether we knew it all, or not, or even, as intimated in the argument at the bar, whether we were proceeding along a path that was wrong economically—irrespective of what may have been the true solution of those problems and the true answers to those questions, we did appreciate that we were all joint participants in an elaborate and sustained effort to provide our people with sufficient of their normal appetites, at prices fairly within reach. As a part of the program in the effort to accomplish that result, we were limiting the sale, the transportation, the allocation of sugar very materially and substantially. And most people, I think, were accepting the situation in the same spirit in which it was tendered.

It is in evidence here that at the time these contracts were made, sugar was on a rising market, —and on a rising market due to a then present, or confidently expected, scarcity of sugar. It is obivious that that was the case, there was not enough sugar to go around. In order that others might not be entirely deprived, some [77] concerns, some individuals, or some territories had to be limited. I know that we had a Fair Price Committee down in Los Angeles, and they were very busily engaged in the matter; unusual efforts were being made to see, not that a few people got all of the sugar, but that everybody got some of

the sugar, if that could be made possible. Under those circumstances, the Fair Price Committee in this community, acting under the direction of the United States Attorney and the Department of Justice, conveyed information to this vender of sugar, the defendant Sugar Company, that it might sell 10,000 tons of Java white sugar under certain limitations, the limitations contained in the contract.

if is, of course, difficult for one to read another's mind: but my own judgment is that the intent of the parties, particularly the government agencies involved, respecting the inclusion of the controverted clause in the contracts, was, primarily, not to prevent the further disposition or the subsequent sale of this particular sugar, but to place such an inhibition upon its subsequent sale that the buyer would buy only the amount then deemed necessary for its own business requirements for the season; and this was in furtherance of what I conceive to be a very commendable plan on the part of those who gave their best thought to the matter;—that sugar should not be hoarded, should not be used unwisely; and that concerns should not, in view of the growing scarcity, become possessed of amounts of sugar ouside of and beyond their real requirements, which they might thereafter, it being in excess of their requirements, make a sale of to their great profit and to the very considerable detriment of the purchasing public.

If this contract had been entered into in normal times, and if the defendant Sugar Company,

had inserted this clause in the contract with the intention on its part to prevent a subsequent [78] sale of this sugar in order that it, itself, thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar, I would be disposed to give very careful consideration to the argument advanced to the effect that that is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. is not a time of peace, it is not a time for the normal operation of usual economic laws; it is a time of war a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known. These contracts were negotiated at a time when everybody was trying his best, was using his faculties to the very best advantage, to see if we might not be able to provide for the distribution of the necessaries of life, of which sugar is one, in such form and fashion as to prevent some considerable menace being offered to the maintenance of social integrity, social harmony and well-being in our midst. People wanted sugar as they wanted other things; and the aim

of the Government, which was concerning itself with the peace and quiet of its people, no less than with the maintenance of its own perpetuity, obviously was to interest itself as best it might in the distribution of sugar, along with other things, in order that no substantial injustices might be done,

and that the greatest number of people who were craving the article might meet with satisfaction.

Under these circumstances, the Government indicated to these parties that this sugar could be sold lawfully, and, therefore sold at all, only if the clause providing for its use by the vendee and against its resale to any other person were inserted in the contracts. It seems to me that under such a state of facts, for this court now to hold that the clauses thus inserted were unreasonable in their nature, so unreasonable as within the terms of the Sherman Anti-Trust [79] Act to invalidate, and nullify, and render absolutely and completely void the entire contracts, would be to attempt the consummation of a thing under the guise of law which really would have not law, or reason, or justice to support it, and would tend to make of this government not a government of law, but a government of men.

There is no evidence in the case that I can see of any attempt, any malevolent motive, on the part of this vender of sugar, to do anything other than comply with what it and nearly everybody else at the same time understood to be the lawful, and the reasonable, and the proper, and the apt demands of governmental authority. Under those circumstances, to hold that in so doing, it must now, in virtue of what has transpired, meet the loss that has been sutained here—an amount in excess of three hundred thousand dollars—would be to work out such an obvious injustice as to shake the very foundations of the social structure which we have

erected here in our midst, and to undermine the confidence of men in government that it will see that private right is maintained and lawful engagements voluntarily entered into are made good.

Now, the truth of the whole thing is easily apparent: this case is here because sugar went down, and there was no thought of getting it here until sugar had gone down. If this contract was void—and that is the argument of counsel for the plaintiff—because of the inclusion of these clauses in it, then, of course, it was wholly void-void at the behest of the defendant in the case; it would have been void in the event of a continued rise in the market and a refusal on the part of defendant to deliver the sugar; would have been held void if the plaintiff had brought suit for damages for such refusal. If it was void in one case, it was void in the other. I can but faintly imagine, however, the [80] vehemence that would have been indulged in here in this court, in support of the argument on behalf of the present plaintiff, that such a clause, entered into under such circumstances, should not suffice to enable one to escape the just consequences of his reasonable and voluntary engagement.

But the shoe is on the other foot; the price of sugar having gone down, these people now seek to escape from the consequences of an unwise move on their part, the purchase of more sugar, really, than they needed in their business. The candy business also went down, as shown by the depositions here. There was less sugar needed

by it after the purchase than previously. Not only was there less sugar needed, but there was more sugar to be had and, therefore, the price went tumbling down. Five or five and a half months after the contract was entered into-five and a half months after they had had time to look it over carefully, five and a half months, no doubt, after it had been well thumbed by all of their various functionaries, for the first time, they came to the conclusion that it was an unlawful contract. an invalid contract, one that shocks the public conscience and is opposed to public policy, one that would result in creating an unreasonable restraint upon interstate trade; and after the sugar had been brought across the wide stretches of the sea and landed ready for delivery, and the price had gone down, and no opportunity was open to the defendant to recoup any of the tremendous loss which might have been overcome if an intimation had been conveyed to it three or four months previously, it is now proposed that this loss shall be borne, not by the buyer of the article who bought too much, but shall be borne by the seller of the article, who was merely trying to provide that which society was demanding of it, and in a way [81] then deemed least inimical to the welfare of society.

Aside from the fundamental disposition which I think should be in the breast of every man who expects to engage and continue in business in the United States of America—the disposition to live up to his contracts once he has entered into them

—I think there ought to be the further but equally prevalent disposition to take one's loss, when it comes, like a sport; and whether it be a loss of \$300,000, as here, or a loss of three hundred cents —having over-purchased, having over-bought, having failed to guess with becoming perspicacity as to the future, if one would contribute something to the well-being of our civilization, he will not seek to avoid such a contract as that—one entailing a loss in virtue of his want of foresightbecause, forsooth, on the narrow ground that five months after he entered into it he got advice that it was unlawful. He should bear this loss—bear it like a man—even if the bearing of the loss mean bankruptcy. Unwelcome bankruptcy may be accepted with honor; unwarranted repudiation, however, is a continuing badge of dishonor. To do the honorable thing at all events, even in the face of loss, is a part of the game; it is a part of the burden. And it seems to me that it is the burden that ought to be maintained by the plaintiff in this case.

Defendant contends that the clause referred to is severable and therefore cannot in any event suffice to invalidate the entire contract. I have not had time to go into the authorities as to that and therefore express no final opinion respecting that phase of the case. I am somewhat of the belief, with respect to a clause that in normal times would be closely allied to the prohibitions of the Sherman Anti-Trust Act,—aimed and intended to benefit the public—that the court should be loath [82]

to hold it a severable clause and one not sufficient, in itself, to invalidate the contract as a whole. But that becomes unnecessary further to consider, and need not enter into the determination of the case at this time, because of the conclusions to which I have come, that, under the circumstances surrounding the transaction, the clause is in no wise an impingement upon the law as laid down by the Supreme Court in its construction of the Sherman Act.

For these reasons, I am of the belief that there is no occasion or propriety for this court at this time to seek to prevent the just consequences of this lawful angagement, lawfully entered into, from falling where they will.

The decree will be in the usual form—discharging the restraining order heretofore issued and dismissing the bill of complaint.

December 28, 1920.

[Endorsed]: Filed Feb. 11, 1921, nunc pro tunc Dec. 28, 1920. Walter B. Maling, Clerk. [83] In the Southern Division of the United States District Court for the Northern District of California, Second Division.

# IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING COMPANY, a Corporation, THE FIRST NATIONAL BANK OF SAN FRAN-CISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation,

Defendants.

#### Final Decree.

This cause came on for final hearing and was argued by counsel, and the Court, upon due consideration of the pleadings and the evidence, and the arguments of counsel, doth now

ORDER, ADJUDGE AND DECREE that this suit and the bill of complaint herein be, and the same are and each of them is, hereby dismissed, and that the defendants do have and recover from the plaintiff their costs and suit herein to be taxed.

ORDERED FURTHER that the order of temporary injunction dated, made and filed herein on December 8, 1920, shall, at twelve o'clock noon of to-morrow, Wednesday, December 29, 1920, stand

vacated and set aside; and leave is hereby reserved to the defendants to proceed herein against the National Surety Company upon its undertaking filed herein December 8, 1920, as they may be advised.

ORDERED FURTHER that this decree shall operate as and have the effect of an assignment by Walter B. Maling, and Walter B. [84] Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the abovementioned order of temporary injunction of December 8, 1920, to the defendant California and Hawaiian Sugar Refining Company of all rights and interests transferred by it to said Walter B. Maling in any or all of the foregoing capacities by three certain instruments dated December 22, 1920, by each of which said California and Hawaiian Sugar Refining Company directed the payment to said Walter B. Maling in any one of the three capacities aforesaid, of a draft drawn by it (there being three drafts in all) against the letters of credit mentioned in the said order of injunction and in the bill of complaint herein; and the said Walter B. Maling, and Walter B. Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the said order of temporary injunction dated December 8, 1920, is hereby empowered and directed, if and when requested so to do by the California and Hawaiian Sugar Refining Company, to execute any instruments necessary or appropriate, or believed by the California and Hawaiian Sugar Refining

Company to be necessary or appropriate, to evidence or effect the retransfer to it of the rights and interests transferred by it to said Walter B. Maling individually and in his several capacities above mentioned by the instruments of December 22, 1920, above referred to.

Dated December 28, 1920.

BENJAMIN F. BLEDSOE.

Judge.

Filed and entered Dec. 28, 1920. Walter B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk. [85]

(Title of Court and Cause.)

(Here follows certified copy of final decree.)

No. 579.

## United States Marshal's Return.

United States of America, Northern District of California,—ss.

I hereby certify and return that I served the writ of which the within is a certified copy, on the therein named, The First National Bank of San Francisco, California, a corporation, by handing to and leaving a true and certified copy thereof with J. K. Moffitt, Vice-president, of The First National Bank of San Francisco, California, a corporation, personally at the city and county of San Francisco, in said District on the 28th day of December, A. D. 1920.

San Francisco, Cal., December 28th, 1920.

J. B. HOLOHAN,

United States Marshal.

By I. W. Grover,

Deputy.

No. 579.

#### United States Marshal's Return.

United States of America, Northern District of California,—ss.

I HEREBY CERTIFY AND RETURN that I served the writ of which the within is a certified copy, on the therein named, Canton Bank, a corporation, by handing to and leaving a true and certified copy thereof with E. F. Sagar, Manager of the Canton Bank, a corporation, personally at the city and county of San Francisco, in said District on the 28th day of December, A. D. 1920.

San Francisco, Cal., December 28th, 1920.

J. B. HOLOHAN, United States Marshal. By I. W. Grover, Deputy. [86]

[Endorsed]: Filed Dec. 30, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

(Title of Court and Cause.)

# Order for Substitution of Party Plaintiff.

On motion of Messrs. John S. Partridge, Ira S. Lillick and Charles Leroy Brown, solicitors and attorneys for plaintiff, and good cause appearing

therefor, and it appearing to this Court that Continental Candy Corporation, a corporation, has been adjudged a bankrupt, and that James B. A. Fosburgh has been duly appointed trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, and has qualified as such trustee as appears from the certified copy of the order approving trustee's bond, which is attached hereto and made a part hereof,—

NOW, THEREFORE, IT IS HEREBY OR-DERED, that James B. A. Fosburgh, as trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, is substituted as plaintiff in the place and stead of plaintiff, Continental Candy Corporation, a corporation, who has since the entry of the final decree herein been duly declared and adjudged a bankrupt; that John S. Partridge, Esq., Ira S. Lillick and Charles Leroy Brown, may be entered as attorneys for the said trustee in the above-entitled proceeding, and that in all necessary pleadings and proceedings in the said action, the said substitution of said trustee and his said attorneys shall be deemed to have been made.

Dated June 25, 1921.

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FRANK S. DIETRICH,
District Judge. [88]

At a Court of Bankruptcy, held in and for the Southern District of New York, at No. 31 Nassau Street, New York City, this 19 day of April, A. D. 1921.

In the District Court of the United States for the Southern District of New York.

IN BANKRUPTCY—No. 29,141.

In the Matter of CONTINENTAL CANDY CORPORATION,

Bankrupt.

Before JOHN J. TOWNSEND, Esq., Referee in Bankruptcy.

# Order Approving Trustee's Bond.

It appearing to the Court that James B. A. Fosburgh, of New York County, and in said District, has been duly appointed Trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the order of the Court, to wit, in the sum of Fifty Thousand (\$50,000) Dollars, it is

ORDERED that the said bond be and the same is hereby approved.

J. J. TOWNSEND, Referee in Bankruptcy.

A true copy.

[Seal]

ALEX. GILCHRIST, Jr.,

Clerk.

[Endorsed]: Filed June 25, 1921. Walter B. Maling, Clerk. [89]

(Title of Court and Cause.)

Stipulation and Order Enlarging Time of Appellee, California and Hawaiian Sugar Refining Company, a Corporation, One of the Defendants Above Named, Under Equity Rule 75, to and Including July 18, 1921.

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including July 18, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LEROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.

Dated: July 1, 1921.

So ordered.

FRANK S. DIETRICH, Judge.

[Endorsed]: Filed Jul. 1, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [90] (Title of Court and Cause.)

Stipulation and Order Enlarging Time of Appellee, California and Hawaiian Sugar Refining Company, a Corporation, One of the Defendants Above Named, Under Equity Rule 75, to and Including August 2, 1921.

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including August 2, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LEROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.

Dated: July 14th, 1921.

So ordered.

WM. W. MORROW, Circuit Judge.

[Endorsed]: Filed Jul. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [91]

(Title of Court and Cause.)

Stipulation and Order in Reference to Settlement of Statement of Evidence Under Equity Rule 75.

TS HEREBY STIPULATED AND TT AGREED (a) that notice that the plaintiff's proposed statement of evidence under Equity Rule Number 75 was lodged with the Clerk on June 27, 1921, is hereby waived; (b) that if the plaintiff was under obligation heretofore to give notice designating a time and place for the settlement of the proposed statement of evidence, his failure to do so is hereby waived; (c) that said statement of evidence shall be settled and allowed by the Court, upon stipulation by the respective counsel hereto, or if said counsel are unable to agree upon said statement, then at a time and place and by a Judge to be hereafter agreed upon by counsel for the respective parties hereto; (d) and if counsel are unable to agree in respect of the matters provided in subdivision "c" hereof, then said statement shall be settled and allowed as provided by law and upon the usual notice for such cases made and provided. Dated: July 16th, 1921.

JOHN S. PARTRIDGE. IRA S. LILLICK, CHARLES LEROY BROWN, BROWN, FOX & BLUMBERG, Attorneys for Plaintiff and Appellant. DONALD Y. CAMPBELL,

GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian Sugar Refining Company, a Corporation.

Attorney for The First National Bank of San Francisco, California, a Corporation.

### DONALD Y. CAMPBELL.

Acting in Absence of, and with Consent of, H. U. Brandenstein, Attorney for Canton Bank, a Corporation.

It is so ordered.

WM. W. MORROW. Circuit Judge. [92]

[Endorsed]: Filed Jul. 21, 1921. W. B. Maling. Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

(Title of Court and Cause.)

Stipulation and Order Enlarging Time of Appellee. California and Hawaiian Sugar Refining Company, a Corporation, One of the Defendants Above Named, Under Equity Rule 75, to and Including August 12, 1921.

IT IS HEREBY STIPULATED that the time

of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including August 12th, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LEROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.

Dated: August 1st, 1921. So ordered.

> VAN FLEET, District Judge.

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [94]

(Title of Court and Cause.)

Stipulation and Order Enlarging Time of Appellee, California and Hawaiian Sugar Refining Company, a Corporation, One of the Defendants Above Named, Under Equity Rule 75, to and Including September 1, 1921.

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the

Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including September 1, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
BROWN, FOX & BLUMBERG,
CHAS. LEROY BROWN,
Attorneys for Plaintiff and Appellant.

Dated: August 11th, 1921. So ordered.

VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 11, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [95]

(Title of Court and Cause.)

Stipulation and Order Enlarging Time of Appellee, California and Hawaiian Sugar Refining Company, a Corporation, One of the Defendants Above Named, Under Equity Rule 75, to and Including September 7, 1921.

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is

California etc. Sugar Refining Co. et al. 119

hereby extended until and including September 7, 1921.

Dated: August 30th, 1921.

JOHN S. PARTRIDGE, IRA S. LILLICK, BROWN, FOX & BLUMBERG, CHAS. LEROY BROWN,

Attorneys for Plaintiff and Appellant.

So ordered.

VAN FLEET, Judge.

[Endorsed]: Filed Aug. 31, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [96]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 579.

JAMES B. A. FOSBURGH, Trustee of the Estate of CONTINENTAL CANDY CORPORA-TION, a Corporation, a Bankrupt,

Plaintiff,

VS.

CALIFORNIA & HAWAIIAN SUGAR REFINING COMPANY, a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation, Defendants.

### Statement of Evidence Under Equity Rule 75.

BE IT REMEMBERED, that the trial of this cause was had in this Court, at the November term thereof, on December 27th and 28th, 1920, before the Court sitting in equity, the Hon. Benjamin F. Bledsoe, District Judge, presiding, Ira S. Lillick, Esq., and John S. Partridge, Esq., appearing on behalf of the plaintiff Mr. J. L. Fox, attorney at law of Chicago, partner of Mr. Charles Leroy Brown, one of the attorneys of record for the plaintiff, and a member of the firm of Messrs. Brown, Fox & Blumberg, Attorneys at Law, Chicago, was also in attendance on behalf of the plaintiff. Donald Y. Campbell, Esq., and Garret W. McEnerney, Esq., appeared on behalf of the defendant, California and Hawaiian Sugar Refining Company. Charles S. Cushing, Esq., and E. E. Richter, Esq., appeared for the defendant, First National Bank of San Francisco, and H. U. Brandenstein, Esq., appeared for the defendant, Canton Bank. The following [97] proceedings were had and the following testimony given, orally and/or by deposition:

Before the trial commenced and at the opening of court on December 27, 1920, the defendant California and Hawaiian Sugar Refining Company filed and made three motions which were in writing, and are hereinafter set out in full. Notices of said motions had been duly and regularly served upon the plaintiff, and the motions came on regularly to be heard. The motions read as follows:

"(Title of Court and Cause.)

## MOTION TO VACATE AND SET ASIDE ORDER OF TEMPORARY INJUNCTION.

"Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, moves this Honorable Court for an order vacating and setting aside the order of temporary injunction heretofore made and filed in the above-entitled suit on December 8, 1920, upon each of the following grounds:

1. Since the making and filing of the aforesaid order of temporary injunction, this defendant has presented to Canton Bank, one of the defendants herein, drafts in conformity with and drawn under and pursuant to the letter of credit issued by Great Lakes Trust Company of Chicago in the sum of \$255,800,00, and has presented to the First National Bank of San Francisco, one of the defendants herein, drafts in conformity with and drawn under and pursuant to the letter of credit issued by the First National Bank of Chicago in the sum of \$300,000.00, and at the time of presenting said drafts delivered to said banks respectively, an order directing and requesting the payment of the moneys thereunder to W. B. Maling, Special Master, appointed by said order of temporary injunction and authorized thereby to receive payment thereof. Notwithstanding said facts, each of said

banks has refused to pay any of said moneys to said Special Master or at all, and no payments have been made on account of said drafts or any of them, or under or pursuant to said letters of credit, or either of them.

The plaintiff herein has refused and still refuses to consent to the payment to the Special Master appointed by said order of temporary injunction of the amount of the drafts heretofore drawn and presented under and pursuant to the aforesaid two letters of credit, and refuses to indemnify the banks upon which said drafts have been drawn respectively, against any claim of liability by said plaintiff, or against the loss or forfeiture of any right or [98] cause of action by said banks respectively, against the plaintiff, growing or arising out of the payment by said banks respectively to the said Special Master of the amount of the drafts drawn upon said banks respectively by this defendant, under and pursuant to the said letters of credit in the event of the payment of said drafts by said banks to said Special Master.

WHEREFORE this defendant prays the judgment of this Honorable Court vacating and setting aside the aforesaid order of temporary injunction heretofore made and filed herein on December 8, 1920.

Dated: December 27, 1920.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian Sugar Refining Co."

"(Title of Court and Cause.)

### MOTION TO DISMISS BILL OF COMPLAINT.

Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, moves this Honorable Court for an order directing the dismissal of the bill of complaint herein, for the reasons and upon the grounds that it appears upon the face of said bill of complaint that:

- 1. The plaintiff is not entitled to the relief prayed for by its Bill of Complaint against this defendant, nor to any relief arising from the facts alleged in said bill of complaint;
- 2. Said bill of complaint is wholly without equity;
- 3. There is a nonjoinder of necessary parties defendant herein, in this, that the First National Bank of Chicago, and Great Lakes Trust Company, the two Chicago banks which upon the procurement of the plaintiff have heretofore issued to this defendant the letters of credit mentioned in said Bill of Complaint, upon which the plaintiff seeks to enjoin this defendant from valuing, and against which it seeks to enjoin this defendant from draw-

ing or presenting drafts, are neither of them joined as a party defendant;

- 4. The plaintiff acquiesced in the validity of each of the contracts of sale dated May 14, 1920, and May 18, 1920, respectively, and in the validity thereof, from the date of said respective contracts until December 1, 1920, and made no claim of the invalidity of said contracts or either of them, despite the fact that during all of said time the market price of sugar of the quality and grade covered by each of said contracts was steadily falling, and that by reason thereof the plaintiff has disentitled itself to any relief in equity, and it would be contrary to equity and good conscience for the Court to take cognizance of said Bill of Complaint or to allow the plaintiff to maintain the same.
- 5. Plaintiff has a plain, adequate and complete remedy at law in respect of the matters complained of in said [99] bill of complaint.

WHEREFORE, and for divers other good reasons of objections appearing upon the face of said bill of complaint, this defendant prays this Honorable Court for an order directing the dismissal of said bill of complaint, and allowing this defendant its reasonable costs in this behalf sustained.

Dated, December 27, 1920.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian Sugar Refining Co."

"(Title of Court and Cause.)

MOTION FOR CALLING UP AND DISPOSITION OF SEPARATE DEFENSES CONTAINED IN ANSWER OF DEFENDANT CALIFORNIA AND HAWAIIAN SUGAR REFINING CO.

Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, and in accordance with Equity Rule No. 29, moves this Honorable Court to at once proceed to separately hear and dispose of each and every of the separate answers and defenses contained in the answer of this defendant before proceeding with the trial of the principal case and before proceeding to a final hearing in said cause, and does hereby move said Court for an Order Directing the Dismissal of said Bill of Complaint for each and every of the reasons and grounds set forth and contained in said separate defenses, and in each of them.

Dated, December 27, 1920.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for defendant, California and Hawaiian Sugar Refining Co."

These motions were presented to the Court on behalf of the defendant, California and Hawaiian Sugar Refining Company by Mr. McEnerney, and in the presentation thereof, he said:

"We shall ask your Honor, before we conclude our motion, to vacate and set aside the temporary injunction, that we be permitted to call certain witnesses whose position in true alignment would be with the plaintiff, although they are named [100] as defendants in this case with us, namely, officers of the First National Bank of San Francisco and of the Canton Bank of San Francisco."

In the course of the presentation of these motions, Mr. McEnerney stated that on December 1, 1920, the defendant California and Hawaiian Sugar Refining Company was served with a notice by the original plaintiff herein, Continental Candy Corporation, a corporation, rescinding the contracts for the sale and purchase of sugar, dated May 14th and May 18th, 1920, respectively, in which rescission was put upon six grounds, one of which was the defendant Sugar Refining Company had failed to ship the sugar as per contract, whereupon the following occurred:

"Mr. PARTRIDGE.—That question of shipment is specifically waived. The shipment was made in time.

The COURT.—And there is no controversy about that?

Mr. PARTRIDGE.—There is no controversy about that."

"Mr. McENERNEY.—Since December 8, 1920, we have complied with every term of the contract, and with every term of each of the letters of credit,

and we have presented our drafts for payment. I hand your Honor copies of these three drafts, and I give copies to the gentlemen on the other side. (The drafts were then handed to Court and counsel.)

The first two drafts, aggregating \$300,000, are drawn on the First National Bank of Chicago; the other one, for \$255,800 is drawn on the Great Lakes Trust Company. They are endorsed in blank. Our papers, as we shall presently show, are in order. Accompanying those drafts, if your honor please, was an order that they should be paid to Walter B. Maling. I will ask your Honor, as we shall presently prove them, to look at the [101] three orders, one accompanying each of the drafts, requiring their payment to Mr. Maling. They are all in the same language, if your Honor please, except two, in similar form, are addressed to the First National Bank of Chicago, and its correspondent here, and deal with two drafts, and the other, one on the Great Lakes Trust Company, and the Canton Bank here, and deal with the third one.

The banks refused payment. As we shall presently prove the receipt of these documents, I hand your Honor a photostat copy of a letter of December 1, 1920, to us from the Canton Bank, and a two-page letter addressed to us by the First National Bank of San Francisco on December 23, 1920, in which, as I understand that letter, they say they were then and there prepared to pay us, but for the presence of the injunction. I ask to hand

those to your Honor. (Copies of these two letters were then handed to Court and counsel for plaintiff.)

In the course of the presentation of these motions, Mr. McEnerney presented and submitted to the Court two telegrams from the Great Lakes Trust Company to the California and Hawaiian Sugar Refining Co., which telegrams read as follows:

(These telegrams were later introduced in evidence by defendant C. & H. R. Co., as part of their Exhibit "S.") [102]

#### Defendants' Exhibit "S."

WESTERN UNION TELEGRAM.

C165ch 136 1 Extra Rush 1920 Dec 23 PM 1 37 Ax Chicago Ill 238P 23

California and Hawaiian Sugar Refining Co—395 San Francisco Calif

Replying your wire twenty third December nineteen twenty Stop Funds are now as they always have been available for payment or drafts drawn against our letters of credit and no action on our part or on part of our correspondent can be by you construed as a refusal on our part to honor any drafts drawn against such letters of credit Stop We note from your wire that drafts as presented have not been made payable to Mailing Special Master and by him endorsed Stop We stand ready able and willing to pay drafts presented against our letters of credit when same are presented in proper form with necessary papers attached and in accord with terms of letter of credit and payment such as not California etc. Sugar Refining Co. et al. 129

to involve us or our correspondent in California injunction proceedings

#### GREAT LAKES TRUST CO.

#### WESTERN UNION TELEGRAM.

D126ch158 1/74

1920 Dec 24 AM 11 48

Ax Chicago Ill 113P 24

California and Hawaiian Sugar Refining Co 379 San Francisco Calif.

Replying your telegram twenty fourth December Stop Our general counsel today advises us that injunction expressly restrains [103] sugar company from taking or receiving payment of any drafts and from negotiating or assigning or making payable to any third person any drafts except as may be necessary merely for presentation and demand for payment and that in the event any draft is negotiated or assigned or made payable to any third person for the purpose specified the endorsees and payees of the sugar company are also enjoined to the same extent as the sugar company Stop We are not parties to the injunction but our correspondent is Stop The question presented is whether or not under the injunctional order our correspondent can pay either to Mailing or on his endorsement Stop Shall appreciate wire from you enlightening us as to opinion your counsel on these legal complexities as naturally we desire avoid placing our correspondent in contempt of court.

GREAT LAKES TRUST COMPANY. [104]

Mr. McEnerney here produced and submitted to his Honor three telegrams from the Sugar Refining Company to the Great Lakes Trust Company, which telegrams read as follows:

(These telegrams were later introduced in evidence by defendant, C. & H. R. Co., as part of their Exhibit "S.") [105]

San Francisco, December 22, 1920.

Great Lakes Trust Company,

110 South Dearborn Street, Chicago, Illinois.

We have today presented to the Canton Bank of this city our draft number two nine five dash A for two hundred fifty five thousand eight hundred dollars drawn upon you to our own order and endorsed in blank all in conformity with your irrevocable letter of credit number ten seventy three issued to us June first nineteen twenty Stop At the same time we presented to the Canton Bank an order executed by us whereby you were requested to pay the amount of said draft to Walter B. Maling a copy of which order appears at foot of this telegram Stop At the time this presentation Walter B. Maling was present in the Canton Bank ready and able to take payment of the amount of said draft Stop At the same time we presented to the Canton Bank all documents which are required by the terms of your letter of credit to accompany Stop At the time of the presentation our draft we were represented by our president and secretary who then and there had power and authority to execute any supplemental or additional papers which might be required by you as in conformity Stop The with the terms of your letter of credit

Canton Bank advised us that they would not accept the responsibility of passing upon our papers and also that they would not negotiate the draft and that they had no funds of yours available for the cashing of the draft Stop Under these circumstances please advise us whether or not it is your intention to provide funds for the payment of this draft or whether we are to treat the situation of today as a refusal by you to honor any draft drawn by us under your letter of credit Stop The above order to pay to Maling reads as follows quote San Francisco December [106] begin twenty second nineteen twenty Great Lakes Trust Company parenthesis Chicago end parenthesis Canton Bank parenthesis San Francisco end parenthesis acting as the agent representative and correspondent of Great Lakes Trust Company parenthesis Chicago end parenthesis and Canton Bank acting in its own right gentlemen please play our annexed draft number two hundred ninety five a for two hundred fifty five thousand eight hundred dollars to Walter B Maling or to Walter B Maling Special Master or Walter B Maling Special Master for the purposes specified in a certain order of temporary injunction dated and filed December eighth nineteen twenty in case number five hundred seventy nine in the Southern Division of the United States District Court for the Northern District of California Second Division in Equity of which order of temporary injunction you have theretofore received a duly certified copy this is addressed to you jointly and to each of you severally California and Hawaiian Sugar Refining Company by Wallace M. Alexander President by Warren H. Mc-Bryde Secretary and quote please wire reply.

CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY.

Charge.

San Francisco, December 23, 1920.

Great Lakes Trust Company,

Chicago, Illinois.

Thanks for your telegram Stop Referring to your suggestion about Maling it is our opinion that an order to pay to Maling attached to our draft is equivalent to making it payable to him on the back of the draft Stop If however you desire us to do so and are prepared to pay in the event we do so we will so endorse the draft to the order of Maling in any form you suggest and shall see to it that it is endorsed by him in any form suggested by you Stop Kindly telegraph whether under these circumstances you will [107] pay and if you wish this course to be pursued by us Stop We also stand prepared to do anything within reason to meet any suggestions or requirements which you will have the kindness to wire us Stop Please wire reply.

### CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY.

Charge.

San Francisco, December 24, 1920.

Great Lakes Trust Company,

110 South Dearborn Street, Chicago, Illinois.

Our counsel advises us that your correspondent

is enjoined from paying under your letter of credit to any person except Maling, but that express authority is given by the injunctional order to your correspondent to pay Maling Stop The provision permitting payment to Maling presupposes of course that payment to Maling would not be made by your correspondent unless we so requested and we therefore executed the order addressed to you and your correspondent asking for payment of the draft to Maling Stop Maling was present when the documents were presented to your correspondent in order that he might personally take payment. Stop Our counsel concur with your counsel in saying that the injunctional order provides that we may present our drafts and demand payment Stop It is true that we are forbidden ourselves to take payment, but the injunctional order expressly provides that we may request you to pay to Maling Stop This we did in our order presented to your correspondent, and as already stated Maling was present to receive payment Stop Please consider the suggestions following Stop Obviously if there were no injunction, we could make our draft payable to the order of Maling Stop The injunction does not prohibit us from [108] making draft payable to Maling but on the contrary expressly provides for payment to Stop In these circumstances we have complied with the terms of your letter of credit and with the terms of the injunctional order and we hope you will concur in this view and advise your correspondent to take up our draft Stop Kindly reply by wire.

### CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY.

Night Letter—W. U. [109]

Mr. McEnerney stated that before concluding his motion to vacate and set aside the temporary injunction, he would ask the Court to be permitted to call certain witnesses who were officers of the First National Bank of San Francisco and of the Canton Bank of San Francisco, and continued his statement of the facts he proposed to put before the Court.

Mr. McENERNEY.—I now ask to call Mr. James K. Moffitt, the cashier and vice-president of the First National Bank of San Francisco.

The COURT.—These banks are parties here, and are represented, aren't they?

Mr. McENERNEY.—Yes, your Honor.

The COURT.—Perhaps we can ascertain from them, on inquiry, what their position and plan is. Isn't that true?

' Mr. McENERNEY.—Yes, your Honor.

Mr. CUSHING.—That letter that was presented the other day by the First National Bank, in which it expressed its willingness to pay, on the documents being sufficient, expressed our ideas on that tender at that time, that we were prevented from paying it by the injunction. The papers at that time seemed to be in perfect order. And as stated there, our answer was given in that letter of our

willingness to pay if the injunction had not existed at that time.

The COURT.—Does that mean that you are willing to pay now in the event the Court construes that that injunction in no way acts as an inhibition on you?

Mr. CUSHING.—That would be our position, when a presentation is made, if your Honor please—in other words, we do [110] not desire to answer anything for the future, what may be the conditions to-morrow, or the next day, because we don't know what might happen in a fast-moving propostion like this is. Our position is now, if the injunction does not exist, and the papers are regular, we shall comply with the letters of credit. We have no desire to do otherwise.

The COURT.—Well, there seems to be no lack of clarity in that answer, Mr. McEnerney.

Mr. CUSHING.—And Mr. Moffitt says that at the time the papers were presented they were in regular form, and that we were willing to pay then if we had not been prevented by the injunction.

Mr. BRANDENSTEIN.—And the position of the Canton Bank is that it is under no obligations to honor the letters of credit on the drafts. It acted merely as a matter of accommodation to the bank in Chicago. Before this suit was brought it withdrew, it occupies no legal relation to the bank in the East which would obligate it to recognize these drafts or these letters of credit. And that is the position expressed in our letter to the California

& Hawaiian Sugar Refining Company before the suit was brought.

Mr. McENERNEY.—On the day the suit was brought, wasn't it?

Mr. BRANDENSTEIN.—As a matter of fact, Mr. McEnerney, the letter was written before the suit was brought. We can establish that by Mr. Sagar. We can establish that beyond doubt. We withdrew.

Mr. McENERNEY.—Did you receive a notice from the Candy Company that they had rescinded this contract, and was that the occasion of this letter. [111]

Mr. BRANDENSTEIN.—No. They admonished us by telegram, I think, that certain questions had arisen and they didn't want us to honor the letter of credit presented.

Mr. McENERNEY.—You mean the Great Lakes
Trust Company did?

Mr. BRANDENSTEIN.—Yes, I think so.

Mr. McENERNEY.—I will offer for your Honor's consideration two letters dated June 8, 1920, and December 10, 1920, whereby the First National Bank of San Francisco associated itself with and became obligor on this letter of credit. Said letters read as follows:

(They were later introduced in evidence by defendant C. & H. R. Co. as Exhibit "Q.") [112]

### Defendants' Exhibit "Q."

# THE FIRST NATIONAL BANK OF SAN FRANCISCO.

Established 1870.

Capital \$3,000,000.

Surplus \$1,500,000.

San Francisco, June 8th, 1920.

California & Hawaiian Sugar Refining Company, San Francisco.

California.

#### Gentlemen:

We have received from the First National Bank, Chicago, copies of your Letters of Credit, No. GCA -6385 and GCA-6414, for \$300,000.00 and \$19,564.16 respectively, both issued in your favor. These credits are irrevocable and are hereby confirmed, and we stand in readiness to pay your draft drawn under their provisions.

Very truly yours,

L. F. CADOGAN,
Assistant Cashier.

LFC:N.

# THE FIRST NATIONAL BANK OF SAN FRANCISCO.

Established 1870.

Capital \$3,000,000. Surplus \$1,500,000. San Francisco, December 10, 1920.

Mr. A. A. Brown, Sales Manager,

California Hawaiian Sugar Refining Company, 230 California Street, San Francisco.

My dear sir:

Referring to the letter of credit hitherto issued in your favor by the First National Bank of Chicago, covering sales of Java sugar to the Continental Candy Company, Chicago: [113]

We are in receipt of a wire from the First National Bank of Chicago, instructing us to quote you therefrom, as follows:

"We wish to make clear that litigation in San Francisco was started against our advice, and we have no desire to escape any liability on any Letter of Credit issued by us. As to sugar testing up to requirements, we assume Continental Candy having attempted to rescind contract, will not inspect sugar or shipping documents. We authorize you to take a guarantee from the California and Hawaiian Sugar Company that the sugar conforms with the requirements of our credit both as to quality and date of shipment. If California and Hawaiian would be willing to give us copies of tests and reports made on sugar by their testor and copy of bill of lading showing shipment from Java, we will appreciate it. If there is anything which California Hawaiian Sugar Company thinks we should do in good faith. have them advise us and we will consider whether we can meet their wishes."

If your company furnishes a guarantee as requested by the First National Bank of Chicago, we, of course, assume the right to have our attorneys pass upon the sufficiency of the guarantee or to submit it for the approval of the First National Bank of Chicago.

We await your advices as to when drafts may be presented to us, drawn under the Credit, and as to whether you will conclude to conform with the wishes of our friends, the First National Bank of Chicago, as indicated above.

Very truly yours,

J. K. MOFFITT,

Vice-president.

JKM:W. [114]

Mr. CUSHING.—And Mr. Moffitt, of the First National Bank, has stated to us that he wishes it to be stated here that the First National Bank made no point about the fact that it had associated itself on the letter of credit. We expressly said that. At the time of the injunction we were associated with it and made ourselves parties to it. Mr. Moffitt says he desires that to be stated. And you will remember that we set that up, Mr. McEnerney.

Mr. McENERNEY.—Yes, I don't offer this on the theory that there is any controversy between the First National Bank of San Francisco and ourselves as to that. The First National Bank of San Francisco set up a letter which they received from the First National Bank of Chicago, asking them to take on the burden of that letter of credit. They then set up a letter, which we have from them, associating themselves with it. Then the next letter that we have from them is a letter of December 10, 1920, the circumstances of which I shall prove if I may be permitted to. The injunction in this case was issued on December 8th. That night the First National Bank of San Francisco

or its counsel wired the full text of that order to the First National of Chicago, and the First National Bank of Chicago either on the 9th or 10th, sent to the First National Bank of San Francisco its telegram which they embodied on December 10, 1920, in a letter addressed to us and which we interpreted to mean that all parties having read the order of injunction on the 8th, and knowing its contents, they would pay, but when we presented our papers they did not pay.

Mr. CUSHING.—It is needless to say on that particular point, Mr. McEnerney, that in our opinion we did not state any such thing. We merely quoted the statement of the Chicago Bank that on certain points about the presentation to the banks they [115] would take your representations. And, Mr. McEnerney, as a matter of fact, as we have stated here, when the presentation was made we did not make any objection on those grounds.

The COURT.—This letter of June 8th seems to be in itself an irrevocable assumption of obligation.

Mr. McENERNEY.—Yes, it is; they do not dispute that, and never have.

Mr. CUSHING.-We make no point on that.

The COURT.—Is there anything in the case now with respect to the lack of support of this guarantee that is spoken of?

Mr. McENERNEY.—No; we fulfilled those requirements. There is no point between us.

Mr. CUSHING.—There is nothing whatever really in the case except the presentation of that; the First National Bank is willing to stand by the

California etc. Sugar Refining Co. et al. 141

letter of credit in its terms, and there is no point about that.

Mr. McEnerney thereupon made the following statement:

Mr. McENERNEY.—This seems to be the position of the First National Bank, if I may interpret it: They are prepared to pay and to honor the obligations on this letter of credit if the transaction is in form to satisfy the requirements of the letter of credit, and they are of the opinion that the presentation which we made does not fulfill the requirements of the letter of credit, because we are forbidden ourselves to collect, and that our order to pay, with our drafts endorsed generally, does not call for the payment by them. They are willing to pay if payment is called for by the transaction, but they are not willing to pay if it is not called for by the transaction, for they assume that in that event they would not have claims over against their correspondent, [116] and they might feel that, no matter what interpretation your Honor might put on this injunction, they would still stand the risk of that being held not the true interpretation of the injunction, if they had occasion to bring suit against the First National Bank of Chicago; so that, if we are to be protected, if the First National Bank is to be protected and to be relieved of being called upon to decide at its peril whether our tender does or does not create and fix their liability, the injunction should be dissolved under circumstances which would bring the money into the hands of Mr. Maling.

Your Honor, this I might mention, because this is one of our points on which we rely to sustain our proposition that the bill should be dismissed for want of indispensable parties; nothing that your Honor could do here will be binding on either of the Chicago banks. They are parties to a contract with us, the First National Bank of Chicago and the Sugar Refining Company; the Great Lakes and the Sugar Refining Company. There is an attempt here to cancel in effect these two letters of credit with the presence of one party here only to the contract. I am speaking now as though no San Francisco bank had ever intervened in the matter. We hold a letter of credit from the Chicago National Bank, and the Candy Company is here seeking to annul that letter of credit without the presence of the First National Bank of Chicago. That does not tell the whole story. The First National Bank of San Francisco, upon the request of the First National Bank of Chicago, associated itself with this letter of credit, and, as your Honor has said, made that letter of credit its irrevocable letter of credit. Now, we take in papers, which we shall claim, if we have no other protection, constituted a full compliance with the terms of the letter of credit, and [117] when the First National Bank refused to pay those two drafts for \$300,000 it became liable for the \$300,000, but it is advised by its counsel that it is not liable for those \$300,000, and, acting upon that assumption, it is put in the position where it cannot make reclamation against the First National Bank of Chicago, because, forsooth, they would say, You have denied liability upon this demenad and you cannot collect from us or hold us in respect of that liability which you, yourself, deny. Then in the course of events it might turn out that our legal opinion of the point was sound and the opinion of counsel for the First National Bank unsound, and we would recover our \$300,000 from them, and they not recover it from the First National Bank of Chicago.

The COURT.—The thing I cannot quite grasp, Mr. McEnerney, is the necessity or desirability at this time of entering into a consideration of the exact rights or the status of the relationship subsisting between these banks here and the banks of Chicago. If this be a valid and enforceable contract, then, of course, you are to employ such means and take such steps and take advantage of such rights as the law of the country affords you; if it be an invalid and illegal contract, it would be the duty of a court of equity to preserve the rights of the parties in so far as the Court is called upon to, and possesses jurisdiction so that no inequity will be done and no wrong done. Now, isn't the Court here concerned only with the question as to whether or not these contracts display illegality?

Mr. McENERNEY.—Not when it is dealing with a motion to dissolve a temporary restraining order, the object of which is to bring the money into the court to abide the final decree, because it is one of the elementary rules in respect to interlocutory injunctions, they they should not be used to decide the case in [118] its ultimate right, and that

their function should be to protect the parties so that when the judgment is decreed finally it will be there able to see to it that no harm has been done to either party.

The COURT.—That will become of moment in the event that the Court should conclude that this injunction should be maintained. If it did that, then in order to protect your rights in the event that the Court should be wrong in its conclusions in that behalf, it would take such action as would enable you in the long run to become possessed of that which it might hereafter be determined you are entitled to.

Mr. McENERNEY.—But in its last analysis, this is a suit between the Candy Company and the Sugar Refining Company.

The COURT.—I understand that.

Mr. McENERNEY.—Over \$555,800. There have been people brought into it, we might say collaterally, and we have rights against those people collaterally, and all that we want to do is to be absolutely certain that if we win this case our rights against these collaterals will not have been destroyed, impaired, or imperiled.

The COURT.—But the point to my mind is, are we to bother with that question at the very inception of the hearing. If the injunction is dissolved, then you are not concerned about the relationship between these parties, you have got your payment that the contract provides for.

Mr. McENERNEY.—The point is this, if there

was 60 days' time to come and go, I would not be making this motion.

The COURT.—Why not proceed with the question as to whether or not this injunction should be continued? If the Court, after hearing both parties here, concludes that the injunction [119] should be continued, then we will take up the question of protecting you and your rights. If the Court concludes the injunction is not warranted and that it should be at once dismissed, then you have your rights as the law provides.

Mr. McENERNEY.—Does it occur to your Honor now that we might proceed to take the testimony and close it up in that way, because—if your Honor please—

The COURT.—Take the testimony with respect to what?

Mr. McENERNEY.—With this point about the late shipping from Java out of the case, the only testimony in the case is the question whether these clauses were introduced into these contracts under the direction of the Department of Justice.

Mr. PARTRIDGE.—If you will pardon me, Mr. McEnerney, there is a further consideration, and there may be several very important considerations which are covered by a deposition in Chicago as to the allegations of the bill that what we call Clause 6 of the contract, the clause providing that under no circumstances shall this sugar be resold, was inserted at the behest and demand of the California & Hawaiian Sugar Company, and over the protest of the Candy Company. Now, that is covered fully

by a deposition that we have from Chicago. The matters in regard to the Governmental direction or orders, if you will, are also taken up in certain depositions that were taken in the City of Washington. I was going to suggest that in so far as any issue of fact is concerned, or any question that may be presented to your Honor's mind by testimony is concerned, that we can conclude that in a very short time, and that the properly and orderly way to proceed is to go ahead with that.

Now, on the question of fact, we have also subpoenaed the Secretary of the California & Hawaiian Sugar Refining Company [120] to bring here other contracts made for sugar, having in mind the question as to whether they contained this prohibition against resale, and also their books showing who are the stockholders of that corporation as bearing upon the question whether they are a monopoly in fact. Now, these matters are matters that we can certainly conclude within a short time.

Mr. PARTRIDGE.—I want to say now, if your Honor please, that it is our purpose, in so far as we are able, to divest the presentation of this case of everything but the single, solitary proposition as to whether or not this contract is in restraint of trade and, therefore, void.

Mr. McENERNEY.—I just want to make one more suggestion: They say they have subpoenaed our secretary to show who our stockholders were on the theory that thereby they would show that we were a monopoly and an outlaw against whom every

man's hand might be raised in safety. That same point, if your Honor please, was dealt with in that little leaflet I handed you in Wilder Manufacturing Company vs. Corn Products Refining Company, where a manufacturer using glucose thought he could beat a contract for the price of goods sold, first, upon the ground that the plaintiff was an outlawed monopoly anyhow, and, secondly, because the contract contained a clause against resale, and for buyer's own consumption. So that when that time comes we shall ask your Honor, on the authority of that case and a number of other cases, to hold that if the contract is legal they are in no position to wage war against it on the theory that we are a monopoly, because, as a monopoly, we have not done them any damage. It would be the same, if your Honor please, if we owned an office building in Chicago and rented the Candy Company a floor. is laid down and decided in so many cases that [121] there is no discussion about that. We learned that, your Honor, when you sat in the State Court, that it is a rule in California and it is a rule of general jurisprudence that you cannot collaterally attack the existence of a de facto corporation, and that same rule runs under the Sherman Act, and under the Clayton Act, and under the general jurisprudence as administered in equity in this court and in all federal courts, and in all state courts. But, if your Honor thinks, in view of Mr. Partridge's statement, that the taking of this testimony will occupy a very short period of time, that we had better take all the testimony and sum up

all of this question at once, I am willing to take your Honor's direction.

The COURT.—I do not want to seemingly, Mr. McEnerney, much less actually, dictate how this case should be presented. I simply want to avoid unnecessary controversies here if such is possible. Now, frankly, and categorically, are you, gentlemen, here to try this case now upon its merits?

Mr. McENERNEY.—Yes.

Mr. PARTRIDGE.—Yes.

The COURT.—With the expectation that it shall be tried on the merits to-day and everything decided?

Mr. McENERNEY.—Yes.

Mr. PARTRIDGE.—Yes.

The COURT.—Why not do that?

Mr. McENERNEY.—I am willing to go on.

The COURT.—All right, let us go about it.

Counsel then agreed that there should be introduced three depositions, and no more; (a) the deposition of Mr. Benjamin Schneewind, on behalf of the plaintiff; (b) the deposition of Mrs. Annette Adams, formerly United States Attorney for [122] the Northern District of California, introduced on behalf of the defendant California and Hawaiian Sugar Refining Company; and (c) the deposition of Mr. J. G. Weatherly, attached to the Department of Justice, at Washington, D. C., to be introduced on behalf of complainant in rebuttal. Thereupon the Court suggested that it would read these depositions during the noon recess, to which counsel agreed, whereupon the morning session was closed

and a recess taken until 2 P. M. The Court reconvened for the afternoon session of December 27, 1920, at 2 P. M., whereupon the following occurred:

The COURT.—I have read the depositions, gentlemen.

The Plaintiff's Exhibits Numbers 1 and 2, respectively, were offered and received and are as follows:

#### Plaintiff's Exhibit No. 1.

COPY.

APPLICATION AND GUARANTY.

COMMERCIAL LETTER OF CREDIT No. ——

Chicago, Ill., June 1, 1920.

Great Lakes Trust Company,

110 So. Dearborn St., Chicago, Illinois.

Gentlemen:

Please open by mail a confirmed credit for an amount not to exceed \$255,800 (two hundred fifty-five thousand eight hundred dollars) in favor of California & Hawaiian Sugar Refining Co., San Francisco,

For account of — ourselves.

Drafts(s) at —— sight, on you.

Plain invoice(s) — yes.

Consular invoice(s) —.

Certificate(s) of weight ——. [123]

Certificate(s) of inspection —.

Marine insurance covered by ——.

War risk insurance covered by ——.

Bill(s) of lading to order of shipper blank endorsed. Covering refined sugar @ \$19.85 per 100# f. o. b. San Francisco.

99% test 25 Dutch Standard.

to be shipped from San Francisco to Chicago. Shipment from Java September and/or October.

Credit to remain in force until Dec. 31, 1920, at San Francisco.

In consideration of your issuing the above said credit I hereby guarantee unconditionally the pay-

we

ment of all drafts drawn under and in compliance with the terms of the credit.

You are to receive a commission of \( \frac{1}{4} \)% together with all expenses incurred by you in connection with the arrangement of the credit and execution thereof. At least —— day prior to maturity of any draft or drafts, the undersigned is to place you in Chicago funds sufficient to pay each acceptance, with interest, if any, and all charges relating thereto.

It is understood that neither you nor your agents here or abroad, will be responsible for the validity, correctness and/or genuineness of the documents purporting to relate to aforesaid credit, nor for the quality, quantity, and/or arrival of the merchandise described in such documents.

It is further understood that if a confirmed credit is ordered the credit may not be cancelled during its life without the consent of all parties concerned.

Yours very truly,

CONTINENTAL CANDY CORPORATION,
(Signed) BENJAMIN SCHNEEWIND,
President. [124]

#### Plaintiff's Exhibit No. 2.

"B Chicago, June 2, 1920. "To The First National Bank of Chicago, Gentlemen:

Having received from you the letter of credit on our account of which the annexed is a copy, for \$300,000.00 U. S. Currency, the undersigned hereby agree to its terms, and in consideration thereof, agree to pay you the amount of each acceptance under it, at maturity, in cash, or prior thereto, if you request it, and it is understood by the undersigned that the commission for accepting under this credit is to be ½ per cent on drafts at sight, plus any charge for confirmation.

The undersigned also agree to pay you the amount of any revenue stamps which you may be required to attach to any acceptances drawn hereunder.

The undersigned hereby give you a specific claim and lien on all goods or merchandise (and the proceeds thereof) for which you may have paid or come under any engagements under this credit, and on all policies of insurance (which the undersigned agree to effect) on such goods or merchandise to an amount sufficient to cover your advances or engagements under this credit and on all bills of lading given for same, with full power and authority to take possession and dispose of the same at discretion, at either public or private sale, with or without notice, for your security and reimbursement and to charge all expenses including commission for sale and guarantee. And at any auction or public sale

by you hereunder you may bid and purchase as freely as third parties. And the undersigned further agree to give you any additional security that may be demanded. And the undersigned further pledge to you as security for any other [125] liability or liabilities of the undersigned to you, due, or to become due, or that may be hereafter contracted or existing, howsoever acquired by you, any surplus that may remain, either in goods or the proceeds thereof after providing for the acceptances under this credit. We further authorize you to cancel this letter of Credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user; and in case you feel insecure or unsafe at any time, any indebtedness due from you to us may be appropriated and applied hereon as well before as after the maturity of any acceptance then outstanding on account of said Letter of Credit.

Neither you nor your correspondents in —— shall be responsible for any loss arising from any difference in quality or character of merchandise imported under this credit from that stipulated and expressed in the invoice accompanying the drafts, nor for correctness or genuineness of documents, nor for delay or deviation from instructions in regard to shipment.

This obligation is to continue in force and to be applicable to all transactions, notwithstanding any change in the individuals composing the respective firm parties to this contract, or either of them, or in that of the user of this credit, whether such

California etc. Sugar Refining Co. et al. 153

change shall arise from the accession of one or more new partners, or from the death or secession of any partner or partners.

Very respectfully,
CONTINENTAL CANDY CORPORATION.
BENJ. SCHNEEWIND,

President.

Recd. June 5. [126]

Mr. McENERNEY.—If your Honor please, the answer contains what would be, if numbered, the tenth defense. It is the last allegation. It is in the nature of a counterclaim. Counsel for the First National Bank thought that might be construed to be a counterclaim against them, and that in that event they would wish to answer; I wish to state now that it is not so designed, and that there is no occasion for them to join issue. And with that assurance they can treat the thing as I have stated it here to be.

Mr. PARTRIDGE.—If it is a true counterclaim, it requires no answer from us, but it may be treated as a cross-bill or a cross-complaint, and if so, Mr. McEnerney, perhaps you would be willing to stipulate that the allegations are deemed denied by us, so that the case may be fully at issue?

Mr. McENERNEY.—Yes.

Mr. PARTRIDGE.—We subpoenaed the secretary of the company, Mr. McBryde; we would like to call him.

### Testimony of Warren M. McBryde, for Complainant.

WARREN M. McBRYDE, a witness called on behalf of the complainant, after being first duly sworn, testified as follows:

I am secretary of the California & Hawaiian Sugar Refining Company. The business of said company is refining cane sugar, and it has a factory located at Crockett, Contra Costa County, California. The term refining cane sugar means the conversion of raw sugar into commercial refined sugar. The company has a process in some cases known as tolling sugar, and the general acceptance of said term is that the raw sugar is put into the refinery and so much refined taken out. It is a process, by the use of bone coal, of purifying the sugar. Bone coal is a calcined animal charcoal. I am not certain whether [127] any Java sugars were ever put through that process. Mr. Rolph, our General Manager, would know about this. In general, the business of the corporation is that of refining any raw sugar, the majority of which is the Hawaiian sugar.

I have produced other contracts that our company has made for Java sugar this year. I cannot say how many of them are for the sale of Java White Sugar.

Q. Have you summed them up?
The COURT.—Are those some of them?
A. Yes.

(Testimony of Warren M. McBryde.)

The COURT.—Say 50 or 100, and let it go at that?

Mr. PARTRIDGE.—Do they all contain the provision known as paragraph 6 in the contract you made with the Continental Candy Company?

- A. I am not familiar with that.
- Q. Have you examined them to determine that?
- A. No.

Mr. McENERNEY.—We will have that information given to you.

#### Testimony of Andrew A. Brown, for Complainant.

ANDREW A. BROWN, called in behalf of the complainant, after being duly sworn, testified as follows:

I am the Sales Manager of the California & Hawaiian Sugar Refining Company and am familiar with the contracts that were made this year with regard to the sale of Java Whites. All of the contracts contained the clause 6, providing against a resale, to the best of my knowledge and belief. I have not examined all of these contracts, but I have had them all before me as the sales were made, and there is only one form issued. The contracts for sugars refined by our company did not contain that clause. That clause was confined entirely to the specific 10,000 tons of Java Sugar sold at this one price.

Q. Did your company this year import any Java sugars, excepting [128] this 10,000 tons you speak about? A. We bought some.

Q. You bought it where?

A. We bought it here, through agents representing Java owners.

Q. And was it brought in consigned to you?

A. Brought in by steamers; it was consigned to agents here.

Mr. McENERNEY.—Q. They arrived here, though? A. They arrived here.

Mr. PARTRIDGE.—Q. How much Java white sugar did you buy this year?

A. We bought altogether, if my memory serves me correctly, a little in excess of 11,000 tons white and 6000 short tons of raw Java.

Q. Did you sell all of that throughout the market?

A. No, we refined the balance of the white, and we refined the raw.

Q. That is, the other thousand tons of the white you refined, and then you sold that under contracts which did not contain this restriction, did you?

A. As I stated before that covered the specific 10,000 tons, the sugar which we sold, Java White.

Q. And none other?

A. Our first purchase of Java White in the entire matter covers that 10,000 tons. We did not buy any Java White during the year 1919. There has been no Java White Sugar, or any other Java sugar, come into this country for years, although I think we bought a cargo in 1911.

Our refined product is distributed from the Chicago and St. Louis line West. We have de-

clined tolling Java sugars for other people at times for various reasons, but have tolled for the United States Government quite heavily this year. I think we tolled for outsiders in small lots, for various people who were in distress, roughly, 1000 tons during the year. As a [129] policy, we did not care to toll for outsiders, although we had no fixed rule.

On May 14th of this year our price for refined sugar was 22.75; the same on the 18th. We sold this Java at 19.85.

- Q. I would like to have you explain just how you bought the 10,000 tons. May I ask, first, the sugar involved in this case is a part of that 10,000 tons, isn't it?

  A. Yes, sir.
- Q. Just how did you buy that, and what was the process by which you got it?
- A. Due to strikes in the Hawaiian Islands, and the general scarcity of sugar, we felt that we needed more sugar, and we went into the market and bought. I made inquiries from various firms; one firm gave me a price and we bought and closed for the sugar. It developed that the sale was through London.
  - Q. Did you buy from the Java refiner?
- A. There is no Java refiner. The sugar that comes from Java is a washed sugar, known as Java Whites. They don't run through the bone coal process. It is not considered refined sugar. I bought this sugar through Otis, McAllister & Co., commission merchants of San Francisco, and entered into a contract directly with Otis, Mc-

Allister & Co. I bought it specifically, 3000 tons from Java in August, 3000 in September, and 4000 in October, and under the terms of the contract it was our option to have it delivered either at San Francisco or Crockett. It was brought here on the Java-Pacific Line. I bought it C. I. F. San Francisco, and the freighting was up to the sellers.

Mr. McENERNEY.—It was sold C. I. F.—cost, insurance and freight from the seller; he put it on board and paid the freight.

#### Q. Is that it? A. Yes, sir. [130]

#### Cross-examination.

Java White in its nature is not similar to sugar used in households in this country.

Q. (By Mr. McENERNEY). In what does the difference consist?

A. In its general large grain and appearance. There has been no trial of it in households because it has not been shipped to this country for a great many years until this year. It is made from cane and is a wash process, primarily made for the East Indian market, because the East Indian will not use refined sugar, the ox being a sacred animal, they will not touch it. During the period of shortage it was diverted all over the world. It has the same percentage of sugar as refined, though not quite as white in color; the grain is larger and much coarser, and not pleasing to the eye, such as the American housewife wants. Java White sugar is primarily for the Indian market, or direct con-

sumption in certain countries which have been using it for years, such as the Levantine nations and England for manufacture. It is suitable for manufacturing purposes such as canned fruits, outside of very white juice fruit, such as Bartlett pears; for peaches or for apricots, or for anything of that nature, having an ordinary dark juice, it would serve the purpose.

In respect to the 10,000 tons which I have mentioned, all the contracts coming under my eye in the course of business, contained clause 6, as we only had one form of contract in respect to that particular 10,000 tons. The reason for putting that clause into contracts covering the sales of Java Whites and not in the sales of our refined sugar was that early in the year there was apparently a great shortage of sugar; the Government so voiced it. They had a strike in the Hawaiian Islands, sugar was not coming promptly. We bought sugar to aid our customers [131] to have sufficient supplies. The Government was very active. The Department of Justice acting as the Food Control, was very watchful and they came to see us constantly, the supplies, and to see that we distributed them properly, that we did not allow them to go to unusual channels. We tried to distribute it fairly. They looked at our margins. A man came around every time we had a block of sugar and saw the number of tons we received, and asked us when we were going to distribute another block. We allocated our sugars then on past performance. We

tried to distribute it fairly. Instead of allowing a man to select the quantity he wanted, we distributed it on past performance over the country in which we formerly did business. The man that I refer to who came around was Mr. Montgomery, from the Department of Justice; he was one of the investigators; he was in the office a great many times during the first six months in the year; I should say offhand, he was there a couple of times a week; sometimes a little oftener; sometimes a little less. He followed up everything and he knew all of our intake and outgo. We sold the 10,000 tons of Java Whites to manufacturers and no one else, although others than manufacturers applied for the purchase of Java Whites, such as wholesale grocers in the Middle West. Under instructions from the Department of Justice we refused to sell these 10,000 tons, or any part of it, and we wired our agent, declining to sell. Mr. Montgomery informed me about the orders coming from his superior in the Department of Justice, Mrs. Annette Adams. We refused to sell Java White Sugar to wholesale grocers in the Middle West because we were instructed to confine the sale of Java Whites to manufacturers, in order to release a larger amount of our regular refined to the consuming public. Pursuing this course, it [132] would enlarge the quantity of sugar available in the household to the extent that the manufacturer could not call on me for my refined sugar. Not only through the directions of the Government, but as a sugar

man, I knew that that would be the effect. By selling to manufacturers, and by forbidding them to resell, we sought to bring about the use of Java Whites by them which the householder would not take, owing to its forbidding aspect.

Q. Was that the only motive of your company in requiring the buyer to agree that it was for his own consumption, and not for the purpose of resale?

Mr. PARTRIDGE.—I object to that, if your Honor please, on the ground that the motive is of no consideration in this contract.

Mr. McENERNEY.—It enters into it.

The COURT.—This is a case where the considerations one way or the other might be equally balanced and motive might have a very determining effect, if that should be the case. Objection overruled.

#### (EXCEPTION No. 1.)

A. As far as I know, it was merely trying to follow out the rules of the Department of Justice.

Statistics show that a total consumption of sugar for household use annually in this country varies, roughly, and it is estimated at 80 pounds per capita, including direct consumption and manufacture, and in tons would be, roughly,  $4\frac{1}{2}$  million long tons. Statisticians keep all their statistical figures in long tons, but we usually speak of tons as short tons. I can not give in round numbers, the number of tons used for household consumption, and the number of tons used for manufacturing; there is a book called Bernard's book, or Bernardi, or some [133] such

name as that, which gives the figures. It gives 4,098,000 tons for the year 1919. We were under direct absolute control then. My recollection is that the proportion of sugar used by households and manufacturing is  $\frac{5}{8}$  for household and  $\frac{3}{8}$  for manufacturing.

I have a memorandum of the prices of refined sugar, for the year 1920, including the dates May 14th, and May 18th, 1920, when we sold Java White to the Continental Candy Corporation. These figures are as follows:

Date	Number of Allotment.	Cents.
January 13	1st	15
January 15	2d	15
February14	3d	15
February 17	$4 ext{th}$	15
March 1	$5\mathrm{th}$	14
March 15	$6\mathrm{th}$	14
April 23	$7\mathrm{th}$	$201/_{2}$
May 5	8th	22 75
May 10	$9\mathrm{th}$	22 75
May 29	<b>1</b> 0th	26 30
June 10	11th	25
June 21	<b>1</b> 2th	$231/_{2}$
June 23	13th	23
June 29	<b>1</b> 4th	22 75
July 1	15th	22 25
July 14	<b>1</b> 6th	21 75
August 5	17 h	20
August 30	18th	17
September 13	19th	15

0		
Date	Number of Allotment.	Cents
September 27	$20\mathrm{th}$	$14\frac{1}{4}$
September 28	21st	14
October 5	22d	$12\frac{1}{2}$
October 6	23d	12
October 14	$24 ext{th}$	11
October 21	$25\mathrm{th}$	<b>1</b> 2
November 3	$26 ext{th}$	11
November 10	27th	$10\frac{1}{2}$
November 16	$28 ext{th}$	10
November 18	$29 \mathrm{th}$	$91/_{2}$
November 23	$30  ext{th}$	9
December 14	31st	$81/_{2}$
December 17	32d	8

The above figures are for our refined sugars and we have no quotations for Java Whites throughout that period. All sugars, including Java Whites, raw, refined and washed sugar, [134] fell in the same ratio. In making allotments of sugar we took a block of sugar, as the raws arrived, and in the refined form we allotted it all over the sections of the country where we did business, on the basis of past performance of the people to whom we allotted it, based on their past purchases; that is, such a percentage of what we had on hand as would be equal to the percentage of ratio which was established amongst them in the history of their purchases from us.

Tolling is where a man has some raw sugar, or semi-raw sugar, that he wishes converted into refined. He tenders it to us and asks us what we will charge for refining it.

The COURT.—Just like taking a little corn to the mill and getting some corn meal back; is that it?

- A. Yes, excepting one thing, and that is the amount you get back depends on the test of the original sugar that was offered by you. We take a certain portion as payment for the refining. We tried to confine our tolling, due to the large amount of our own sugar, strictly to the Government, which imported on transports for the use of the Army, large blocks of sugar. I think we tolled something like 12,000 or 14,000 tons for the Army.
  - Q. Do you toll any of the Hawaiian sugar? A. No.
- Q. And outside of for the Government it is a very negligible item in your business, is it?

A. We have not tolled this year, because circumstances were not such that they asked anybody to toll. To my knowledge this year is the first time we have tolled for anyone outside of the Government. I think we have tolled for them before.

I am familiar with clause 7 which appears in the contracts of May 14th and May 18th, 1920. In taking this sugar for their requirements, they could not call on us for any more of our own sugar. That was supposed to be their quota, as far [135] as we were concerned, from the time we delivered it, for the rest of the year. The allotments were a kind of a prior matter, in one sense, although at the time we did this, we were acting under orders, you might say, of the Department of Justice.

Clause 7 was introduced by the direction of the Government. On May 14th and May 18th, 1920, and ever since, there were about 18 or 20 refiners in the business of refining and selling refined sugars and raw cane in this country.

- Q. As I understand it, neither clause 6 nor clause 7 was in the contract whereby you sold your own refined sugar? A. No, sir.
- Q. But they were introduced into this 10,000 ton lot? A. Yes, sir.
- Q. And you refined the extra thousand tons of Java White which you obtained, did you?
  - A. Yes, sir.
- Q. So that never came into a Java White contract? A. No, sir.

#### Redirect Examination.

To my knowledge, Java Whites were not bought by the wholesalers and retail trade for domestic and restaurant consumption. I do not know whether or not the chain of restaurants known as Childs used that sugar on their tables.

- Q. (By Mr. PARTRIDGE.) Now, in regard to this clause 7, in regard to the quota, you made two contracts with the Continental Candy Company, didn't you? A. Yes, sir.
  - Q. The first one was for how many tons?
  - A. 750.
- Q. And you inserted in there that that was to be their quota, didn't you? A. Yes, sir.

- Q. And then you took another contract with them for 500 tons? A. Yes, sir.
  - Q. That was to be another quota, was it?
  - A. It was so understood. [136]

Mr. McENERNEY.—The trouble with that is that the contract says it is their quota from the date of delivery to the end of the year. They haven't got it yet. And if the railroad doesn't speed up they won't get it.

Mr. PARTRIDGE.—I was wondering why there were two quotas ordered to be put in there by the Government.

Mr. McENERNEY.—Because they had the stereotype form of contract; that is all.

Mr. PARTRIDGE.—Q. In other words, Mr. Brown, you took contracts for as much sugar as people wanted, didn't you. A. No, sir.

Q. Why did you make that second contract for the additional 500 tons?

A. Because they wanted more sugar in one month than they could get; they wanted more September sugar than the 250 tons which they got in September, and they couldn't get it, and then they took later sugars—October.

Q. When you made the first contract with them, on May 14th, did you, under direction of the Government, determine that that was to be their quota for the year?

A. There was another trade still hanging in abeyance. We had a little sugar left that was not sold, and we passed it out to people in that form,

in the form of Java Whites. The records will show if those were the last contracts made on the 10,000 tons. There were some remnants, which caused the second contract, by reason of the fact that in different sections, a certain quota to Kansas City, some to Omaha, and some to Chicago, didn't take the full amount of their quota, and it was allowed to go to other sections. I cannot say at this minute that the second contract was for sugar we had left over after we had made contracts for the entire 10,000 tons.

- Q. Are you sure that you made no contracts for Java sugar [137] with anybody besides actual manufacturers? A. Yes, sir.
  - Q. No wholesale grocers? A. Absolutely none.
- Q. And nobody in the trade except those that were going to use it?
  - A. Except those that were going to use it.
  - Q. Did you make any contracts with canners?
  - A. Not for any of this sugar.
  - Q. Were they all candy manufacturers?
  - A. There were no canners.
- Q. That doesn't quite answer my question. Were they all candy manufacturers?
- A. I don't want to make a misstatement, but as near as I can remember, Candy manufacturers—there may have been some large wholesale bakers. The National Biscuit Company, if I remember right, took some. The Corn Products Company took some.
  - Q. Those contracts are all here, aren't they?

A. Yes.

Q. Supposing you take a look at them and see.

The COURT.—Wait. That might be interesting, but how is it material, Mr. Partridge?

A. There was none sold for direct consumption, your Honor.

Mr. PARTRIDGE.—I assumed that the witness' testimony in regard to the nonuse of this sugar by household or restaurant consumers was based on the proposition that it was not fit for that. I was wondering whether or not any of these sugars were put out with the expectation that they were to be used for those purposes.

Mr. McENERNEY.—Well, we can look at that later, Mr. Partridge. If you are through with Mr. Brown now, he can run over the contracts and tell you.

A. (Continuing.) I recall two; the National Biscuit Company. I don't know whether they make candy in connection with [138] their business, and also the Corn Products Company, which makes syrup; none of it was sold for direct consumption, or to groceries, I can assure you of that.

Clause 6 was put in to the contract on the verbal say-so of Mr. Montgomery, and also the Fair Trade Commission, who were working in conjunction with Mr. Montgomery's superior, Mrs. Annette Adams. The Fair Trade Commission was formed under the Department of Justice. H. Clay Miller was the chairman.

Q. Did he come down and tell you that in all the Java sugars you must put in the clause that it should not be resold under any circumstances?

A. He told me that they passed on the thing. Mr. Montgomery came to the office and told me distinctly that, as I remember; whether Mr. Miller told me over the phone or in person, I don't remember, but he did so tell me. Mr. Montgomery and Mr. Miller told me that I must put in a clause that it was not for resale. Mr. Montgomery told us that Mrs. Annette Adams wished us to sell this sugar to manufacturers only, and that they had to use it in their own manufacturing, and not to resell for profit; it could not be passed on; that we had to put that in our contract. Furthermore, in supplying them with this amount of sugar, they could not call on us for any further refined sugar.

Mr. PARTRIDGE.—Q. Did either of these gentlemen tell you to put that clause in the contract for the sale of your own refined sugar?

A. That had not come up, and never did come up.
The COURT.—Did they say anything about it?
A. No.

The COURT.—Well, all right, just be specific.

Mr. PARTRIDGE.—Q. There was no discussion then, in regard to restricting the sale of your own refined sugars at [139] all?

A. There was restriction, that we had to spread it out, do the right thing, allocate it.

Q. I mean in regard to the question of resale.

A. No, sir.

Q. Did you sell any refined sugar to confectioners, or candy makers, or bakers, or canners?

A. Some.

#### Recross-examination.

Milton H. Esberg, John A. Britton, John R. Hanify, R. B. Hale, E. S. Heller, Mrs. Aaron Sloss, and Mrs. Helen M. Knight, are the names of some of the members of the Fair Trade Commission. The only person I saw was H. Clay Miller, the chairman.

We first came under Government surveillance in the matter of rationing sugar and the sale of sugar shortly after August 1st, 1917; I cannot give you the dates. They are all a public record and history. We were dealing in these matters under Government supervision from 1917 down into 1920, and past these two contracts. We kept informed as to the regulations which were being put forward in the matter by the Government and were familiar with them from time to time as they came out. Mr. George Rolph was and now is the General Manager of our Company. He became the head of the Sugar Administration under Mr. Hoover, at Washington, D. C., but resigned from the Company during that time, and was in Washington about three years.

#### Further Redirect Examination.

Previous to these contracts, the Continental Candy Company bought refined sugar from us. I know they bought some in 1919. I knew their quota because they succeeded the Novelty Candy

Company, some time early in 1919. The Novelty Candy Company had been a purchaser from us before that time. I do not [140] know whether the Candy Company bought all their sugar from us, and I do not have any idea how much they needed for their business in 1920.

Further Recross-examination.

(Defendants' Exhibit "A"—a telegram—was offered and received in evidence, dated May 5th, and marked Defendants' Exhibit "A.") Said exhibit was introduced by defendant California and Hawaiian Sugar Refining Company, and read as follows: [141]

### Defendants' Exhibit "A."

(POSTAL TELEGRAM.)

San Francisco, May 5, 1920.

Henry Flarsheim,

Care Seavey & Flarsheim Brokerage Company, Kansas City, Mo.

We have permission from the local authorities to sell the Java Whites with following restrictions First Sale to manufacturers only for their own manufacturing needs and under no circumstances are they to resell Second Sales of this sugar to manufacturers to constitute their quota of sugar from us from delivery date of Java Whites until end of year Stop With above ruling it will be in order that you confirm if sales are still open to your confirmation St. Louis office National Candy one thousand tons August five hundred tons each

September October Blanke Wenneker One hundred tons each August September October Busy Bee Candy Forty tons each August September October Best Clymer One hundred tons each August September October All shipment from Java in the months named nineteen eighty five net landed weights fob cars San Francisco Letters of credit covering Stop Under ruling must decline Kohl Grocer Quincy three hundred tons Stop Regarding Chicago Corn Products one thousand tons could make August shipment from Java which would readily arrive Chicago long before end October unless railway strike prevented Confirm if for use in Chicago territory only and in no event for shipment to Eastern plants Stop In line our letter April twenty third sale these sugars to manufacturers is expected to release later an equal amount of our output to jobbers Stop You have ample time to sell balance but naturally do not wish to miss sales to manufacturers who may replace elsewhere Leave disposition balance in your hands.

## CALIFORNIA AND HAWAIIAN SUGAR REFINING CO. [142]

(The document is handed to witness.)

That was a telegram sent by the California & Hawaiian Sugar Refining Co. to Mr. Henry Flarsheim, of the Seavey & Flarsheim brokerage company, to whom we look for the general conduct of the sale of our sugar in the River Section, and through whom the 1250 tons of sugar were sold to the Continental Candy Corporation. Their Chi-

cago Manager, Mr. George J. Tennison, is the particular man in that concern who dealt with the Continental Candy Company, and is here in court. Our company melted a little in excess of 400,000 short tons this year.

The COURT.—Q. You gave a resume of the process in 1920; I detected roughly, a rise during the first six months and a fall during the succeeding six months. What, generally, was the cause of that fluctuation?

A. All sugar people believed there was going to be a big shortage, it looked very much like it, especially early in April, when disquieting news came as to the condition of the Cuban crop; the market for raw sugar became very much excited; people plunged and bought everywhere all over the world for the United States. Suddenly we woke up to find that instead of a shortage in this country we had swapped our good dollars for the sugar of all nations, and that they had tightened their belt line and let us have their sugar for our money; then the market began to sag, and it sagged very quickly.

Q. When was that discovery made?

A. It came upon us like a guillotine, in the middle of July.

Q. And immediately thereafter prices began to drop?

A. Yes, and instead of having a shortage we found we had a heavy carry-over, especially of domestic beet sugar in this country.

In addition to the 18 or 20 refineries operating May 14th and May 18th, 1920, there were on those dates and since, [143] down to the present time, about 100 factories manufacturing beet sugar. The output of the 18 or 20 refineries is about three and three-quarter million long tons, and of the 100 beet manufacturers, about a million short tons this year.

I received a letter on September 2d, 1920, from the Continental Candy Corporation, which was forwarded to us from our Chicago house.

This letter was offered and received in evidence by the defendant Sugar Refining Company, and was in the words and figures following:

"Gentlemen: When your Mr. Flarsheim called on us some time ago, and very kindly offered to ship us C. & H. Sugars in place of Javas we had purchased, we thought at that time that we could have these sugars shipped as soon as possible if your company could do so, figuring that part of this could be used in our Jersey City and New York plant. Since that time, conditions beyond our control have developed so it will be impossible for us to pay for these sugars. Therefore, we would like to have you ship the September contract in November; October in December, at which time we think we will be in position to take care of them.

"The reason we are forced to do this is as follows: We contracted for a large amount of sugars to be shipped in April, May, June, July, August and September; but on account of the strike in Cuba and the scarcity of sugars early this year,

our shipments were not made on the dates specified; in fact, were delayed about six weeks; April shipments not arriving here until June, and the other shipping period delayed accordingly. In August, however, since Mr. Flarsheim was here, we have had twenty-five thousand bags of sugar shipped to us, and in order [144] to take care of this we had to borrow to the limit of our ability. If financial conditions were normal, we would have been able to take care of this contract, but you know what the financial situation is.

"Trusting that you can see our position in the matter, and appreciating your generosity in being willing to ship C. & H. instead of Javas, we are, "Yours very truly,

### "CONTINENTAL CANDY CORPORATION, "BENJAMIN SCHNEEWIND,

"President."

(It was on the letter-head of the Continental Candy Corporation, dated Chicago, September 2, 1920, addressed to the Seavey & Flarsheim Brokerage Company, 326 West Madison Street, Chicago.)

Q. When did you first hear from them in repudiation of their contract?

A. Within a comparatively recent period. I would say somewhere around October.

Q. Was it October or November?

A. It might have been the first of November, right around there.

Mr. PARTRIDGE.—That is alleged in the bill, Mr. McEnerney, and not denied, that date, I think.

Mr. McENERNEY.—Very well.

Mr. McEnerney here offered in evidence a certified copy of a letter by Howard Figg, Esq., Special Assistant to the Attorney General, written to the American Sugar Refining Company, April 29, 1920. This letter is set forth in the answer of the California & Hawaiian Sugar Refining Company, and is as follows:

#### "DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

April 29, 1920.

The American Sugar Refining Company,

New York City.

#### Gentlemen:

It was very clearly established at the conference held by me with representatives of the various eastern sugar refiners on April 26, that speculation and resales within the trade were very largely responsible for present unequal distribution and exorbitant prices. The refiner can very definitely help in relieving this situation by circularizing his trade to the effect that he will distribute to regular customers only, and will refuse to accept any export and toll business except where contracts are now in existence; and he would feel justified in excluding from participation in future allotments any customer who is believed to have sold to speculative buyers.

I shall insist upon a strict enforcement of Rule 6, of the Special License Regulations, which pro-

hibits resales within the trade. I herewith quote for your information, as well as for that of your trade, this Rule:

'Resales within same trade prohibited, when—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.'

I hope that you will give this matter your immediate consideration, sending me a copy of your letter to your regular customers.

# Yours very truly, (Signed) HOWARD FIGG,

Special Assistant to the Attorney General."

Mr. PARTRIDGE.—We will object to this as immaterial, irrelevant and incompetent. It is a letter by a Special Assistant to the Attorney General to the American Sugar Refining [145] Company in New York, with regard to a certain Rule 6 of the Food Administration, in which he states that he would insist upon a strict enforcement of Rule 6, which Rule 6 does not even cover the prohibition in the contract here.

The COURT.—Then you won't be hurt any.

Mr. PARTRIDGE.—I don't know as we will be hurt, but it is entirely immaterial.

The COURT.—Overruled. I suppose you are going to show your authorization?

Mr. McENERNEY.—Yes.

#### (EXCEPTION No. 2.)

Prior to May 14th, 1920, I became aware of the nature of a letter addressed by Mr. Figg, of the Attorney General's office, to the American Sugar Refining Company, dated April 29, 1920, against resale within the same trade. This became disseminated among all sugar people; it was published in all sugar journals before May 14th, 1920.

Mr. McENERNEY.—I desire to offer in evidence a certified copy of the Rules and Regulations governing the sale of sugar, and the licensing of persons. What was the date of your license?

Mr. FOX.—The application was made June 30, 1920; the license was issued on September 9, 1920.

Mr. McENERNEY.—Then in the year 1920 up to June 30, 1920, you had no application pending for a license and none was in existence?

Mr. FOX.—We sold only small lots of sugar at that time.

Mr. McENERNEY.—But you had no license for selling sugar in that period, and had not applied for a license: That [146] is right, is it?

Mr. FOX.—Yes.

Mr. McENERNEY.—We will take that as an admission.

A certified copy of the Rules and Regulations governing the sale of sugar and the licensing of persons was here offered in evidence by the defendant Sugar Refining Company, and marked Defendant's Exhibit "C," which read as follows: [147]

#### Defendants' Exhibit "C."

T.

#### A. GENERAL REGULATIONS.

The following general rules correspond to General Rules, Series B, which become effective, unless otherwise noted, on November 1, 1917.

RULE I. REPORTS TO BE FURNISHED.— It shall be the duty of each licensee to give to such representative as may be designated by the United States Food Administrator, whenever the said representative shall so require, and information concerning the conditions and management of the business of the licensee. Reports, when requested by said representative, shall be made on such blanks, to be furnished by the United States Food Administration, as the United States Food Administrator may designate, giving complete information regarding transactions in any commodities, imported, manufactured, refined, packed, purchased, contracted for, received, sold, stored, shipped or otherwise handled, distributed or dealt with by the licensee, or on hand, in the possession or under the control of the licensee, and any other information concerning the business of the licensee that such representative may require from time to time. Whenever the said representative shall require it, the licensee shall furnish such information on writing under oath.

RULE 2. PROPERTY AND RECORDS TO BE OPEN TO INSPECTION.—The authorized representative of the United States Food Administrator shall be at full liberty, during ordinary business hours, to inspect any and all property stored or held in possession or under the control of the licensee, and all records of the licensee. All necessary facilities for such inspection shall be extended to the said representative by the licensee, its agents and servants.

RULE 3. MUST KEEP RECORDS.—The licensee shall keep such records of his business as shall make practicable the verification of all reports rendered to the United States Food Administration.

RULE 4. INFORMATION FURNISHED NOT TO BE DIVULGED.—No agent or employee of the United States Food Administration shall divulge or make known in any manner, while he is such agent or employee or thereafter, except to such other agents or employees of the United States Food Administration as may be required to have such knowledge in the regular course of their official duties, or except in so far as he may be directed by the United States Food Administrator or by a court of competent jurisdiction, any facts or information regarding the business of the licensee which may come to his knowledge through any examination or inspection of the business or accounts of the licensee or through any reports made by the licensee to the United States Food Administration.

RULE 5. UNREASONABLE PROFITS PRO-HIBITED.—The licensee shall not import, manufacture, store, distribute, sell, or otherwise handle any food commodities on an unjust, exorbitant, unreasonable, discriminatory, or unfair commission, profit, or storage charge. [148]

RULE 6. RESALES WITHIN SAME TRADE PROHIBITED, WHEN.—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to results in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.

RULE 7. SPECULATION PROHIBITED.— No broker or other licensee shall buy or sell any food commodity for his own account unless he is also regularly engaged in, and holds himself out to the trade as conducting, the business or distributing such commodity otherwise than on a commission or brokerage basis, or unless he uses such commodities in manufacturing; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution.

RULE 8.—SALES TO SPECULATORS FOR-BIDDEN.—No licensee shall knowingly sell any food commodity to a broker or other licensee who is not buying for personal consumption or engaged in using such commodity in manufacturing, or who is not regularly engaged in, and holding himself out to the trade as conducting, the busi-

ness of distributing such commodity otherwise than on a commission or brokerage basis; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution.

RULE 10. UNFAIR PRACTICES FOR-BIDDEN.—The licensee shall not buy, contract for, sell, store or otherwise handle or deal in any food commodities for the purpose of unreasonably increasing the price or restricting the supply of such commodities, or of monopolizing, or attempting to monopolize, either locally or generally, any of such commodities.

RULE 11. MUST NOT COMMIT WASTE.— The licensee shall not knowingly commit waste, or wilfully permit preventable deterioration in connection with the production, importation, manufacture, storage, distribution or sale of any food commodities.

RULE 12. MUST REPORT CHANGE OF AD-DRESS.—The licensee shall report within ten days in writing, to the United States Food Administration any change of address, or any change in the management or control of the person, firm, corporation or association licensed, or any change in the character of the business.

RULE 17. MUST NOT DEAL WITH PER-SONS VIOLATING FOOD CONTROL ACT. The licensee shall not, except with the written consent of the United States Food Administrator, knowingly sell any food commodities to or buy any food commodities from any person who shall, after this regulation goes into effect, violate the provisions of Sections, 4, 6, 8, or 9, of the Act of Congress approved August 10, 1917, making an unreasonable rate of charge therefor or otherwise selling, holding, or dealing wrongfully in or with such commodity.

NOTE.—This rule became effective November 1, 1917, and was amended to its present form January 28, 1918. [149]

NOT BE MISLEADING.—The licensee shall not issue or make public, market quotations or make any statements to any person regarding the price at which food commodities are being sold, which quotations or statements cannot be verified either from his own records or from the records of other licensees, and shall not make any other misleading statements which tend to enhance the price of any food commodities.

RULES AND REGULATIONS.—The words used in these rules and regulations shall be construed to import the plural or the singular, as the case demands. The word "person," whenever used in these rules and regulations, shall include individuals, partnerships, associations, and corporations. The word "food commodities," whenever used in general or special rules and regulations, unless otherwise specified, shall include all commodities specified, by the President in any license proclamation already issued or which may thereafter be issued by him under the authority of section 5

of the act of Congress approved August 10, 1917, known as the Food-Control Act

Dealings on an exchange, board of trade, or similar institution shall include only such dealings as are made by public trading on the floor of the exchange under the supervision of the exchange, board of trade, or similar institution, in such ring, pit, or other similar place as may be especially reserved by the exchange, board of trade, or similar institution for public trading.

RULE 21. SPECIAL RULES PREVAIL OVER GENERAL RULES, WHEN.—Nothing contained in these general rules and regulations shall be construed as restricting, modifying or affecting in any manner the operation of any special rules and regulations which have already been promulgated or which may hereafter be promulgated, and whenever any special rule is inconsistent with a general rule, the special rule shall prevail.

RULE 22. LICENSE NUMBER MUST BE PLACED ON CERTAIN DOCUMENTS.—The licensee shall place on every contract, order, acceptance of order, invoice, price ist, and quotation issued or signed by him relating to food commodities the words "United States Food Administration License Number," followed by the number of his license. No licensee shall knowingly buy any food commodities from or sell any such commodities to, or handle any such commodities for, any person required to have a license who has not secured such license and complied with the provisions of this trade.

# UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE,

Washington, D. C., December 7, 1920. [150] Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of the original General Regulations, on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Seal of the Department of Justice.)

# A. MITCHELL PALMER,

Attorney General. [151]

A certified copy of a Proclamation of the President was offered and introduced in evidence by the defendant Sugar Refining Company, and marked Defendants' Exhibit "D," transferring to the Attorney General the powers and authority theretofore held by the Food Administrator, except those relating to wheat and wheat products, which are transferred to Julius H. Barnes; the document bearing the signature of the President of the United States, and dated November 21. 1919, and the same read as follows: [152]

### Defendants' Exhibit "D."

(TRANSFERRING TO THE ATTORNEY GENERAL THE POWERS AND AUTHORITY HERETOFORE HELD BY THE FOOD ADMINISTRATOR EXCEPT THOSE RELATING TO WHEAT AND WHEAT PRODUCTS WHICH ARE TRANSFERRED TO JULIUS H. BARNES.)

# BY THE PRESIDENT OF THE UNITED STATES OF AMERICA. A PROCLAMATION.

Whereas under the authority of an act of Congress entitled "an Act to provide further for the national security and defense by encouraging the production conserving the supply, and controlling the distribution of food products and fuel," there was created by Executive Order, dated August 10, 1917, a Governmental organization known as and called United States Food Administration, and

Whereas Herbert Hoover was appointed United States Food Administrator with power to supervise, direct and carry into effect the provisions of said Act and the powers and authority therein given to the President so far as the same apply to foods, feeds and their derivative products and to any and all practices performed and regulations authorized or required under the provisions of said Act, including the issuance, regulation and revocation in the name of said Food Administrator of licenses under said Act; and in this behalf to do and perform such acts and things as were author-

ized or required of him from time to time by direction of the President and under such rules and regulations as should be prescribed by the President from time to time, and

Whereas by Executive Order of November 16, 1918, Edgar Rickard was authorized and empowered during the absence of Herbert Hoover, United States Food Administrator, from the United States to exercise the powers and authority delegated to Herbert Hoover as United States Food Administrator, and

Whereas Herbert Hoover has resigned from the office of the United States Food Administrator and Edgar Rickard has exercised certain of the said powers and authority of the United States Food Administrator until this time, and

Whereas it is now desired to transfer the powers and authority of the United States Food Administrator in the manner and to the officers hereinafter designated.

Now therefore under and by virtue of the power conferred upon me by the provisions of said act of August 10, 1917, and of all other Acts giving me power of the premises, I, Woodrow Wilson, President of the United States, hereby order and direct as follows:

All acts done and authorized by Herbert Hoover, United States Food Administrator, as aforesaid, and by Edgar Rickard, acting for Herbert Hoover, United States Food Administrator, as aforesaid, are hereby authorized, approved, ratified, confirmed and adopted. [153]

The powers and authority heretofore vested in the United States Food Administrator, under the authority of said act of Congress approved August 10, 1917, and to the executive orders and proclamations issued thereunder, in so far as they apply to wheat and wheat products, are hereby transferred to, and shall hereafter be exercised by Julius H. Barnes, Chief of the Cereal Division of the United States Food Administrator, who shall supervise, direct, and carry into effect the provisions of said act, and the powers and authority therein given to the President, so far as the same apply to wheat and wheat products, and to any and all practices, procedure, and regulations authorized or required under the provision of said Act, including the issuance, regulation, and revocation, in the name of said Julius H. Barnes, Chief of the Cereal Division of the United States Food Administration, of licenses under said Act relating to wheat and wheat products, and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such rules and regulations as may be prescribed by the President from time to time; and there is hereby transferred to said Julius H. Barnes, Chief of the Cereal Division of the said United States Food Administration, all remaining records of said United States Food Administration, and such of the remaining personnel and organization of saidUnited States Food Administration, as he may determine to continue under him as Chief of the Cereal Division

of the United States Food Administration as aforesaid.

All licenses and revocations of licenses and all regulations now in force, so far as the same apply to wheat and wheat products, shall continue in force until altered or repealed by said Julius H. Barnes.

The powers and authority heretofore vested in the United States Food Administrator, under the authority of said Act of Congress approved August 10, 1917, and the executive orders and proclamations issued thereunder, in so far as they apply to foods, feeds and other derivative products, other than wheat and wheat products, are hereby transferred to, and shall hereafter be exercised by the Attorney General of the United States, who shall supervise, direct, and carry into effect the provisions of said Act, and the powers of authority therein given to the President, so far as the same apply to foods, feeds and their derivative products, other than wheat and wheat products, and to any and all practices, procedure, and regulations authorized or required under the provisions of said Act, including the issuance regulation, and revocation. in the name of the Attorney General of the United States, of licenses under said act relating to foods. feeds and their derivative products other than wheat and wheat products, and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such rules and regulations as may be prescribed by the President from time to time.

All licenses and revocations of licenses and all regulations now in force, so far as the same apply to foods, feeds and their derivative products other than wheat and wheat products, shall continue in force until altered or repealed by the Attorney General. [154]

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 21st day of November in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred Forty-Fourth.

(Seal)

WOODROW WILSON,

By the President.

UNITED STATES OF AMERICA.
DEPARTMENT OF JUSTICE.

Washington, D. C., December 11, 1920.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of a copy of the original of the President's Proclamation on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Seal of the Department of Justice)

THOMAS J. SPELLACY,
Ass't Attorney General. [155]

A certified copy of a letter of the Attorney General, Mr. T. W. Gregory, to the President of the United States, dated August 23, 1917, was introduced in evidence by the defendant Sugar Refining Company, and marked Defendants' Exhibit "E," and the same read as follows: [156]

# Defendants' Exhibit "E."

187130-6 GCT-t August 23, 1917.

Aug. 24, 1917.

Dear Mr. President:

I have considered the letter of Mr. Hoover, United States Food Administrator, dated the 22d instant, transmitted through you, in which he makes inquiry as to his powers in certain respects under the Food Control Act approved August 10, 1917. Among the enumerated purposes of this Act are these: To assure an adequate supply and equitable distribution of certain enumerated necessaries, and to establish and maintain governmental control of such necessaries during the war. (Section 1.)

In carrying out these purposes the President is authorized

to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, \* \* \* to co-operate with any agency or person \* \* \* (Section 2.)

Under this authority the President has created the office of United States Food Administrator.

The present inquiry in substance is whether

under this authority the Food Administrator by direction of the President may enter into agreements with persons in the various trades or industries within the scope of the Act which have the effect of fixing prices or of pooling output—in short, agreements which if made between private traders would violate the Sherman Anti-Trust Law. [157]

Since no specific agreement or arrangement is before me, I can only speak generally. I am of the opinion that any agreement made with producers or traders by the Government itself (through the Food Administrator acting by direction of the President), under authority of Section 2 of the Act, and having a reasonable relation to the objects enumerated in Section 1, for example, to assure an adequate supply and equitable distribution of necessaries and to establish and maintain governmental control of necessaries during the war, would not fall within the operation of the Sherman Anti-Trust Law, even though the effect of the agreement or agreements were to fix a uniform price or to accomplish a pooling of the output./ This, because governmental action with respect to prices or methods of distribution is obviously not within the mischief at which the Sherman Law was aimed. On the contrary, when natural laws of trade break down, the governmental action in this regard may become essential to prevent the private control of markets. For, when natural laws of trade can no longer be depended upon to regulate markets, the only choice is between artificial control imposed by private interests and artificial control imposed by public agencies. In these circumstances, therefore, such governmental action, so far as running counter to the purpose of the Sherman Law, is directly in line with it.

I am equally clear that the President has no power under the Food Control Act to authorize price fixing or pooling agreements between the producers or traders themselves.

Sincerely yours,

T. W. GREGORY, Attorney General.

The President,

The White House. [158]

# UNITED STATES OF AMERICA. DEPARTMENT OF JUSTICE.

Washington, D. C., December 13, 1920. Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed letter is a true

copy of the original on file in this Department.

IN WITNESS WHEREOF, I have hereunto

set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Seal of the Department of Justice)

A. MITCHELL PALMER, Attorney General. [159] A certified copy of the application to the United States Food Administration by the Continental Candy Corporation, for a license to sell sugars, was offered in evidence.

Mr. FOX.—The actual application was an informal application of June 30, 1920.

Mr. McENERNEY.—I am offering now the formal application on a blank of the Food Administration, dated September 9, 1920.

The COURT.—That is the one that is referred to in the deposition, is it not?

Mr. McENERNEY.—I have not seen the deposition.

Mr. FOX.—Yes.

The document was admitted and marked Defendants' Exhibit "F" and the same read as follows: [160]

# Defendants' Exhibit "F."

Form Bb 607

Return to

UNITED STATES FOOD ADMINISTRATION.
WASHINGTON, D. C.

LICENSE SECTION. 172382

..... Sep 9, 1920 (Leave Blank.) (Leave Blank)

Date......

Place all your present Food Administration license numbers with their serial letters here:

No. Card F. H.

# APPLICATION TO THE ATTORNEY GEN-ERAL OF THE UNITED STATES FOR LICENSE.

FOLLOW INSTRUCTIONS EXACTLY.
PLEASE USE TYPEWRITER OR PRINT
NAME AND ADDRESS PLAINLY.

- 1. Name under which business is conducted CONTINENTAL CANDY CORPORATION.
- 3. Address—212 East Austin Avenue Chicago.

  (Number and Street) (City or town)

  Cook Illinois

  (County) (State)
- 4. Name of owner if applicant is an individual.
- 5. Gross sales for calendar year 1918, approximately, \$3,702,324.14.

Hereby applies for license as Manufacturer or Distributor (or both) of Foods and Feeds as indicated on the following pages.

# (BE SURE TO SIGN YOUR APPLICATION ON PAGE 4)

JUL 13 1920

Referred 7/16/20

 $\mathbf{H}$ 

Approved see letter 9/7/20 from Mr. A. L. Newton. [161]

2.

Place check mark after each group and each

commodity or operation in each group that applies to your business.

1 Importor of Com ( ) Oats ( ) Dvo ( )

-t-•	importor of Coli ( ), Octob ( ), 10,0
	Barley ( ) ( )
2.	Distributor of Corn ( ), Gats ( ), Ryo ( ),
	Barley ( ) ( )
3.	Importer of Sugar()
4.	Manufacturer of Sugar()
5.	Distributor of Sugar $(\lor)$
6.	Operator of Elevator Storing Corn ( ),
	Oats ( ), Rye ( ), Barley ( )( )
7.	Operator of Warehouse Storing Corn ( ),
	Oats ( ), Rys ( ), Barley ( ) ( )

If you are engaged in distributing food or food commodities to the ultimate consumer only and the total gross receipts from the annual sales of such commodities amount to less than \$100,000, you are not subject to a U. S. Food Administration license and need not fill out and return this application.

3.

After checking your activities on page 2, please describe here your business in your own language as completely as possible: Manufacturers of Confectionery.

In the spaces provided below give the following information:

- (1) If a corporation, give names and addresses of corporate officers and their official titles. ✓
- (2) If a partnership, give names and addresses of the members of the partnership.
- (3) If an association, give names and addresses of officers or managing agents. [162]

If the business is conducted by an individual only, these spaces need not be filled in.

Name—Benjamin Schneewind, President.

Address-4142 Oakwald Ave., Chicago.

Name—William A. Millet, Vice-President.

Address-37 Wall St., New York City.

Name—George F. Lewis, Secretary.

Address—340 Claremont Ave., Jersey City, New Jersey.

4.

On this page describe separately (use a separate section each time) all the places where you carry on business.

If the spaces provided for the listing of your places of business are insufficient, give the additional information on plain white paper, sign and return attached to this application.

### A.

1. Location—340 Claremont Ave. Jersey City.

(Number and street) (Town) (County)

New Jersey.

(State)

- 3. Length of time in business at this point 10 years.....months.
- 4. Storage capacity (bushels).....(Applies only to grain elevators or warehouses.)

В.

Location—337 East Illinois St. Cook. (Number and street) (Town) (County) Illinois. (State) 2. Describe plant ("Office," "Elevator," etc.) Length of time in business at this point..... 3. 6 months vears....months. Storage capacity (bushels).....(Applies only 4. to grain elevators or warehouses.) C. Location .... 1. (Number and street) (Town) (County) (State) Describe plant 2. ("Office," "Elevator," etc.) [163] Length of time in business at this point..... years.....months.

4. Storage capacity (bushels).....(Applies only to grain elevators or warehouses.)

The statements and representations regarding the business of the applicant, as set forth in this application, are, to the best knowledge and belief of the applicant, true and correct.

(Do not use typewriter for signature.)

Sign here—CONTINENTAL CANDY COR-PORATION.

By BENJAMIN SCHNEEWIND,

President.

Look over your application carefully before you return it.

BE SURE IT IS COMPLETE.

#### UNITED STATES GRAIN CORPORATION.

AGENCIES: Baltimore

General Office

Buffalo Chicago

42 Broadway.

Duluth Galveston

Kansas City, Mo. Minneapolis

New York City.

New Orleans New York City

18th & D Streets, N. W.

Omaha

Washington, D. C.

Philadelphia Portland, Ore. St. Louis San Francisco

In your reply refer to

December 7, 1920.

I hereby certify that the attached papers are a true and correct photostatic copy of the original application for license to the Attorney General of the United States for license of Continental Candy Corporation, a corporation of New York, address 212 East Austin Avenue, Chicago, Cook County, Illinois, the original of which is [164] on file in this office and in my custody.

(Seal of the United States Food Administration.) JOHN G. DUDLEY,

Manager, Washington Office, United States Grain Corporation, Custodian of the Records of the United States Food Administration, Pursuant to Executive Order of the President, Dated August 21, 1920. [165]

Mr. McENERNEY.—We will offer a certified copy of a blank form of license issued and in use in the Department of Justice. That was in force September, 1920, and following, and was necessarily the one which the Candy Company obtained from the Department of Justice. The document was marked Defendants' Exhibit "G." Said exhibit read as follows: [166]

# Defendants' Exhibit "G." NOT TRANSFERABLE. No. G......

# UNITED STATES OF AMERICA. LICENSE.

# LICENSE IS HEREBY GRANTED TO

This license is subject at any time to revocation, in whole or in part, or for a limited or unlimited period, for violation by the licensee, or by any officer, agent, or employee of the licensee, or any of the provisions of said Act or any amendment thereof, or of said regulations now or hereafter in force.

The licensee is required, whenever called upon by the Attorney General of the United States, or his representative, to furnish information and to make reports concerning his business in such detail as shall be prescribed, and shall keep such records of his business as shall facilitate the verification [167] of information contained in said reports; and all property, books, records, and accounts of the licensee are at all times subject to the inspection of the Attorney General of the United States, or his duly accredited agent or representative.

This license is based upon the statements in licensee's application, on file with the United States Food Administration, Washington, D. C. All changes, such as change in firm or corporate name, new place of business, or changes in or additions to activities, must be reported immediately.

Dated.....

# A. MITCHELL PALMER.

Attorney General of the United States.

Form Bb-0541.

#### STATES GRAIN CORPORATION. UNITED

AGENCIES: Baltimore

General Office

Buffalo Chicago

42 Broadway,

Duluth Galveston

Kansas City, Mo Minneapolis

New York City.

New Orleans New York City

18th & D Streets, N. W.

Omaha

Washington, D. C.

Philadelphia Portland, Ore.

St. Louis San Francisco

In your reply refer to

December 7, 1920.

I hereby certify that the attached copy is a true [168] and correct photostatic copy of the license form in use on September 9, 1920, for issuance to licensees. I further certify that the original is on file in this office and in my custody.

(Seal of the United States Food Administration.)

JOHN E. DUDLEY.

Manager, Washington Office, United States Grain

Corporation, Custodian of the Records of the United States Food Administration, Pursuant to Executive Order of the President, Dated August 21, 1920. [169]

An uncertified copy of a Proclamation of the President of October 30, 1920, was offered in evidence by the defendant Sugar Refining Company, no objection being made to the introduction on the ground that it lacks certification. The said instrument was marked Exhibit "H" and read as follows: [170]

# Defendants' Exhibit "H."

# CANCELING LICENSE OF CERTAIN FOOD COMMODITIES.

# A PROCLAMATION.

WHEREAS, under and by virtue of an Act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," approved by the President on the 10th day of August, 1917, it is provided among other things as follows:

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel, including fuel oil and natural

gas, fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for actual production of foods, feeds, and fuel, hereafter in this act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act."

AND, WHEREAS, it is further provided in said act as follows:

"That, from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining or distribution of any necessaries, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessaries as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for systems of accounts and auditing of

accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation and the entry and inspection by the President's duly authorized agents of the places of business of licensees."

AND, WHEREAS, by virtue of the above provisions certain public announcements were made by the President from time to time as a result of which the importation, manufacture, storage and distribution of certain necessaries were licensed.

[171]

AND WHEREAS, a changed situation has been brought about by the present armistice in the war between the United States and Germany, and by the approaching expiration of the powers granted to the President by an Act of Congress entitled "An Act to provide for the national welfare by continuing the United States Sugar Equalization Board until December 31, 1920, and for other purposes," approved by the President on the 31st day of December, 1919.

NOW, THEREFORE, I, WOODROW WILSON, President of the United States of America, by virtue of the Powers conferred upon me by said Act of Congress, hereby find and determine and by this PROCLAMATION do announce that it is no longer essential in order to carry into effect the purposes of the Act that the importation, manufacture, storage or distribution of certain necessaries be subject to license, to the extent hereinafter specified.

Licenses heretofore required for the importation,

(Testimony of Andrew A. Brown.)

manufacture, storage or distribution of certain necessaries are hereby cancelled, effective November 15, 1920, with respect to the following:

All persons, firms, corporations or associations engaged in the business of importing, manufacturing, storing or distributing sugar, or any product or by-product of the foregoing named necessary.

All regulations issued under the said Act covering licensees so dealing in these commodities are hereby canceled, effective November 15, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE in the District of Columbia, this 30th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty, and of the Independence of the United States of America the One Hundred and Forty-fifth.

(Seal)

WOODROW WILSON.

By the President:

NORMAN H. DAVIS, Acting Secretary of State. (No. 1579.) [172]

Further Redirect Examination.

Mr. PARTRIDGE.—Q. Mr. Brown, you told us about the amount of sugar refined by defendant, California & Hawaiian Sugar Refining Company. Was that sugar all from the Sandwich or Hawaiian Islands? A. No.

Q. Where did the rest of it come from?

(Testimony of Andrew A. Brown.)

- A. Various countries.
- Q. Well, where? A. Formosa, Java, Manila.
- Q. Was that raw sugar from these countries?
- A. Yes, except the additional 1000 tons of white which we melted.
- Q. What extent or what proportion of your business comes from the plantations in the Islands, and by the "Islands" I mean the Sandwich or Hawaiian Islands?
  - A. A very large proportion.
- Q. Under what kind of an arrangement does the California & Hawaiian Sugar Refining Company refine the raw sugar produced by these plantations?

The COURT.—This is going into a lot of detail.

Mr. McENERNEY.—I object to that on the ground it is irrelevant. They do not buy any of the sugar that we refine.

The COURT.—I do not see any materiality to that inquiry. It will be sustained as irrelevant.

Mr. PARTRIDGE.—May we have an exception? The COURT.—Yes.

(EXCEPTION No. 3.)

Here the complainant rested.

# Deposition of Benjamin Schneewind, for Complainant.

The deposition of BENJAMIN SCHNEEWIND, herein above referred to, as offered by the complainant and received in evidence was taken in Chicago on December 22, 1920, before Edward An-

(Deposition of Benjamin Schneewind.) drew Doyle, notary public in and for the county of Cook, Illinois, and is as follows: [173]

Direct Examination by Mr. CHARLES LeROY BROWN.

I am president of the Continental Candy Corporation, a New York corporation, complainant in this action. I reside at Chicago, where the company has an office, although the main office is located in New York City. The Company was incorporated, approximately, May 1, 1919, and its business is manufacturing confectioners, which means that it manufactures and sells candies and confectioneries of all descriptions. We sometimes sell our surplus of raw material and supplies. Sugar is one of the principal items that we use in our business, and I conducted such purchases of sugar that was used by the company in Chicago, and some of the sugar for other plants of the corporation. Since the organization of the company it operated in Chicago, Jersey City, New Jersey, and New York City, New York; and since that time I have been President.

The greatest demand for sugar is in the fall of the year. During the first year of the corporate existence of the company, ending early in May, 1920, approximately twelve million pounds of sugar was used. My business experience has demonstrated the necessity of keeping figures on the world's production, and available sugars, and I had this in view in May, 1920. On May 1, 1920,

(Deposition of Benjamin Schneewind.) approximately the entire beet crop of 1919-1920 had been disposed of. The Cuban position at that time showed six hundred and fifty thousand tons of sugar less in Cuba than at the same period last year. Louisiana is the only place in the United States which produces cane sugar, and that is not available until the latter part of November or in December. We tried to procure sugar on contract from various sources and were unable to do so at a fixed price. At that particular time sugar was hard to get. I made inquiry from Meinrath Brokerage [174] Company, who are the largest distributors of beet sugar in the country; they probably sell seventy-five or eighty per cent of all the beet sugar. They were trying to get some proposition from Western Beet Refiners and they submitted one proposition which was on the basis of the market price at time of shipment, less onehalf cent per pound. In order to secure this sugar we had to put up Fifty Thousand Dollars, which was part of the purchase price, which was to be regulated by the market price on the date the shipment was made, the price being then unfixed further than that the price should be one-half cent per pound less than the price of cane sugar at the date of shipment in the fall.

In May, 1920, prior to my conversation with Mr. Tennison, who represented the Seavey & Flarsheim Brokerage Company, we were unable to obtain any cane or beet sugar contracts for fall delivery at a fixed price. The Seavey & Flarsheim Brokerage

Company are sugar brokers, representing the California & Hawaiian Sugar Refining Company, one of the defendants in this case. They have an office in Chicago, and also, I think, in St. Louis and in Kansas City. Mr. Tennison, the representative of Seavey & Flarsheim Brokerage Company, in Chicago, called me on the telephone and stated that he had some 25 Dutch Standard, 99 Test Java Sugars for September shipment in Java, but that he only had two hundred and fifty tons left, which he would offer to us. He also had five hundred tons of October sugars; the price to be \$19.85 f. o. b. Coast. I told him I would let him know within a day or two whether I would take it. In the meantime I figured out what sugar we had due on contract, and our usual requirements for the months succeeding, and found that we did not have enough sugar, with these seven hundred and fifty [175] tons, to last us the balance of the year. I then stated this to Mr. Tennison and he told me he expected to get a further allotment within a few days, and he thereafter informed me that I could have five hundred tons more, for October shipment. The contracts attached to the bill in this case and marked "Exhibit A" and "Exhibit B," and dated May 14th and May 18th, 1920, respectively, were signed by me about on the dates they bear. The contracts were entirely drawn up and prepared before I saw them, and were presented to me by Mr. Tennison. After the first presentation to me of the contract of May 14, 1920, I asked Mr. Ten-

nison why there was a clause in there restricting the sale, and why it was out quota from the California & Hawaiian Sugar Refining Company for the balance of the year; and he stated that they. the California & Hawaiian Sugar Refining Company, could not sell any sugar without those provisions in the contract. Mr. Tennison had charge of the Chicago office of Seavey & Flarsheim Brokerage Company, who were the representatives of the California & Hawaiian Sugar Refining Company's sugars. Not one word was said in my negotiations with Mr. Tennison about the inclusion of the clauses numbered 5, 6 and 7 in the contract, and I never requested the inclusion of these clauses. The provision in paragraph six of each of these contracts, restricting or prohibiting resale of sugar was not of any possible advantage to our Company, and I signed these contracts with the provisions of clauses 5, 6 and 7 in them because we could get sugar from no other source at a fixed price. I signed each of these contracts as President of plaintiff corporation, about the dates they bear, at Chicago, and made application for a letter of credit. I signed three copies of each contract and they were all sent to California for signature. I received one copy of each of them [176] back, executed by the California & Hawaiian Sugar Refining Company, some time about the middle of June. Some time after the original arrangements were made with Mr. Tennison, I procured letters of credit through the First National Bank and the Great

Lakes Trust Company. The letters were dated respectively, June 1st and June 2d, and were issued on those dates. I read portions of the contract to Mr. Clifford, of the First National Bank, and Mr. Chatterton, of the Great Lakes Trust Company, showing the tonnage, date of delivery and the dates of shipment, the price and the description of the sugar, and obtained letters of credit from the First National Bank in the sum of three hundred thousand dollars, and the Great Lakes Trust Company in the sum of Two hundred and fifty-five thousand eight hundred dollars. No one other than myself had anything to do on behalf of the Continental Candy Corporation in obtaining these two letters of credit.

Q. (By Mr. BROWN.) Did the Continental Candy Corporation have a license, in 1920, issued by the Attorney General of the United States, authorizing the Continental Candy Corporation to carry on business in foods, in accordance with the proclamations of the President, and the Regulations prescribed by him under what is known as the Lever Act, as amended?

Mr. BALLOU.—I object to that.

A. Yes, sir.

Mr. BALLOU.—I object to the question, unless the license is produced, as not being the best evidence; and ask to see the license.

Mr. BROWN.—The answer admits that we had a license.

Mr. BALLOU.—Irrespective of any allegations,

in the further and separate answers of the defendants, we claim that the [177] plaintiff must produce the license alleged in his bill of complaint, as to which the defendant in paragraph 1 of its answer states that it is without knowledge.

Mr. BROWN.—I would state, in reply to the objection, that the bill in paragraph 1, contains an error in its allegation,—that the plaintiff's license was obtained from the United States Sugar Equalization Board, and that we intend to amend the bill so as to show the license issued by the Attorney General of the United States, as alleged in the answer of the defendant, on page 28.

Mr. BALLOU.—That does not cover my entire objection, as I would want to see the date of that license, as well as its authority.

Mr. BROWN.—We will have to resume this afternoon, anyway, probably.

Mr. BALLOU.—Yes.

Mr. BROWN.—Q. Your answer was what?

A. Yes, sir.

In May, 1920, our business increased about seventy-five per cent over the same period of 1919. June business increased from five hundred thousand pounds in 1919, to nine hundred and twenty-seven thousand pounds in 1920; July, from five hundred and eighty-two thousand pounds to seven hundred and fourteen thousand pounds; in August, 1919, we shipped one million three hundred and twenty-seven thousand pounds; and in 1920, four hundred and twenty-two thousand pounds. In

September, 1919, we shipped one million eight hundred and twenty-eight thousand pounds; and in 1920, six hundred and eighty-four thousand pounds. After the sugar shortage which I referred to, in May, 1920, the change in the ability of purchasers to obtain sugar commenced in August [178] when it was easier to obtain, and has been getting more plentiful ever since. In August, 1920, we received two and one-half million pounds, which was purchased along before the May contracts were entered into. After the receipt of the August shipment of sugar, the company, considering the then state of its manufacturing business, had a supply of sugar which was greater than its needs for a period of time, four or five months in advance. We sold some of this surplus. On December 1, 1920, we had a surplus. Most of our departments were closed down and not operating, on or about the first day of December, 1920, and ever since that date. We found our position was such, and it is common in the business of manufacturing candy and confectionery for the manufacturer at some times suddenly to find that manufacturing and selling conditions are such, that he will not need sugar for a considerable time in advance. The causes that may bring about this common condition are a good many: strikes, or fire, or amount of business; and at such times, candy manufacturers usually sell oversupplies of any raw materials that they have. We also sell contracts; that is, sell the sugar that is called for by any contracts

we may have. We had quite a number of opportunities to sell these White Java sugars covered by the contracts of May 14 and May 18 with the defendant Company, if we had been free to sell them. Quite a number of persons approached us with reference to purchasing the White Java Sugars covered by the contracts of May 14th and May 18, 1920. John J. Jacques Company and Ruffner, McDowell & Company, sugar brokers, asked us quite a number of times if we had any sugars to sell, and especially these Javas.

My experience in the manufacturing of candy and the conduct of that kind of business has been extensive. [179]

Cross-examination by Mr. BALLOU.

The amounts of sugar which plaintiff corporation used during certain periods appear in our manufacturing reports. Our records cover daily, weekly and monthly periods. I can give records showing the amount of sugar used in the Chicago plant since the date of the incorporating of the Company. The sugar the subject matter of this contract was not entirely intended for use in our Chicago manufacturing. Part of it was intended to be used in Jersey City. From the date of the incorporation to date, I have never used Java White Sugar for manufacturing purposes. I have seen samples of it, but I never understood that it is a sugar that is not generally sold for direct consumption by housewives and others, but is suitable for manufacturing purposes. I do not

know how it would be for manufacturing purposes. Nor do I know from my experience in the candy business how it compares for direct consumption by housewives with the cane granulated and the beet granulated. I should not think it would make any difference. At the date of the two contracts now in question, the only contract that we had in force was with Lamborne & Company, of New York.

Mr. BALLOU.—Q. Do you remember, in a report of June 30, 1920, a statement made to your stockholders that all your requirements for the remainder of the year were covered by your contract with the California & Hawaiian?

Mr. BROWN.—We object to the question, first on the ground that no statements in that report are competent, under the issues in this case; second, that if the inquiry is directed toward an admission, it is in no manner contrary to any statement of the witness on direct examination; and, third, that it is not cross-examination. [180]

Mr. BALLOU.—My justification for asking it is that the witness testified very generally and exhaustively as to the state of his stocks and his requirements at various periods during the year 1920, how his requirements increased or decreased; and any statement made by the corporation in its report to the stockholders as to the sufficiency of their requirements being covered, is proper cross-examination of that line of testimony.

Mr. BROWN.—We have no objection to your asking him the fact, as to whether on June 30 the requirements were so and so.

Mr. BALLOU.—Q. Without waiving the question, without waiving the production of the company's own report on that subject, I will ask that question, whether on June 30, 1920, the Candy Corporation had covered its requirements for the year?

A. Yes, sir, it had.

We did not anticipate a heavy drop in business, which afterwards occurred.

I made the Lamborne contract and believed that that contract, and the California & Hawaiian contracts covered our company's requirements for the balance of the year. The Lamborne contract did not have any clause against resale, or any clause about quota, incorporated therein.

The Continental Candy Company succeeded the Novelty Candy Company on May 1, 1919, and enlarged the business.

Q. Now, at that date you were aware, were you not, that the sugar business of the United States was being done under a license?

Mr. BROWN.—We make the same objection to that.

Mr. BALLOU.—Answer it, subject to the objection that the question was one as to a matter of law. [181]

A. Well, according to the information that we got from the Secretary of the Association, the Manufacturing Confectioners did not have to be licensed.

Q. But you have also stated that in the candy business you sometimes have to sell the surplus of raw material? A. Yes, sir.

Q. And sugar is one of your raw materials, is it not? A. Yes, sir.

Q. Now, from the information that you received, did you become aware that if you wanted to sell sugar you had to have a license to do it?

A. As soon as we found out we had to have a license we applied for one.

Q. When was that?

A. I do not know. I did not do that. The Secretary of the company did that.

Mr. BALLOU.—I ask that that Secretary be produced.

Mr. FOX.—Do you want to serve a subpoena?

Mr. BROWN.—The Secretary is in New York.

Mr. BALLOU.—Are you sure that the Secretary did that?

Mr. BROWN.—It is the Assistant Secretary.

At the time of making this application, I presume we made a report of our sugar usage. That is all I know. I do not remember interviewing any agent of the Department of Justice on the subject, nor of any agent of the Department here in Chicago investigating our application by personal interview with me. I do not know Mr. Maher, nor do I remember being interviewed by him. I have no independent recollection of when the application was made, but I think it was some time early in 1920. We went through the year 1919

(Deposition of Benjamin Schneewind.) without any license to sell sugar. There was no necessity of selling any surplus raw sugar at that time, and therefore we did not apply for license. The [182] necessity of selling raw material first arose this year. Our business for the first six months did not increase over the same period last year; it was only May, June and July that had increased over last year, although the first three months were less than last year, although the total tonnage to July 1 was less than the same period last year, speaking only of the Chicago plant.

Under advice by circular from the National Confectioners Association, our attention was directed to the advisability of getting a license to sell surplus raw materials.

(Here the witness handed to Mr. Ballou a circular dealing with acute sugar shortage. The witness stated that this circular was not the one which inclined his mind towards the advisability of taking the necessary steps to get rid of a surplus but that it was information that the company received from the Association; that was the reason why he applied for a license.)

I think it was in May or June when we first applied for the license. It must have been several months, according to the best of my recollection, between the time the license was applied for and the date of its issuance. To the best of my recollection we applied for a license to sell sugar some time in May or June, 1920, and received it several months later.

Mr. BALLOU.—Q. In paragraph 9 of your complaint you state that the plaintiff is bound by its separate contract with the First National Bank of Chicago and Great Lakes Trust Company, respectively, to repay each of these banks any sum advanced by it under the letter of credit. What do you mean by the separate contracts?

. Q. Will you kindly produce those?

Mr. BROWN.—I will answer you now, that we do not [183] have copies of those.

Mr. FOX.—The banks would have them.

Mr. BROWN.—They are on file with the banks, but we cannot produce those.

Mr. BALLOU.—You will make an endeavor? I will ask the witness, you have no copies of the contracts with the First National Bank and the Great Lakes Trust Company with respect to the letters of credit?

A. We have no copy of it, no. We signed the application; that is all.

Mr. FOX.—You do not get copies.

Mr. BALLOU.—I am asking the witness.

Q. You signed the application? Is that what you refer to as the contract?

A. Yes, the application for the letter of credit. That is all we have. But I presume that is the contract we signed, for the application, for the letter of credit.

- Q. You refer to it sometimes as the contract, and sometimes as an application?
  - A. I did not refer to it at all.

Q. How?

A. I did not refer to it at all. Our attorneys. Mr. BROWN.—As you ask to produce it, let me ask the witness, do we have any application, or copy of any application?

A. We have not.

Mr. BROWN.—The witness not having any copy of the application, there is nothing for us to produce. So far as I have been able to ascertain from inquiry at the bank, there is no formal written application, but the bank upon getting the data for the letter of credit from the customer, makes out two or three [184] copies, a signed original of which is sent to the party in whose favor it is drawn, and an exact copy is delivered to the customer,—the third copy being retained by the Bank. On the back of the third copy is a printed form of contract by which in this case the Continental Candy Corporation agrees to repay the bank any acceptances made on the letter of credit. I am not certain whether precisely the same procedure was followed at the Great Lakes; as to whether the agreement to repay is printed on the back or is attached to the copy retained by the Bank.

Mr. BROWN.—Q. (To Mr. Schneewind through the courtesy of Mr. Ballou.) Now, that you have heard my statement in explanation of why we cannot produce these contracts, do you yourself know or remember as a result of conversations had between me and the representative of the First National Bank, at which you were present, that that is the statement that they gave us and that the

statement I have made is true,—or am I wrong?

A. No, the statement is true. This is the first letter of credit I ever asked for at a bank and I know very little about it excepting that I signed the application. I think I signed a separate application. I do not mean the document on the back of the letter of credit. I signed a form that they presented to us, asking for a letter of credit. That is the only thing I remember of signing. I remember only one signature.

At this point the taking of the deposition was adjourned to 2:30 o'clock, P. M. of the same day, December 22, 1920, at which time the taking of the deposition was resumed.

The plaintiff offered in evidence, without objection, and by agreement between counsel, the following documents: [185]

Chicago, June 30, 1920.

Department of Justice,

Washington, D. C.

Gentlemen:

We beg to make application for a license to sell sugar.

Yours very truly,

CONTINENTAL CANDY CORPORATION. FJK-MJ.

Department of Justice,
Washington, D. C.,
July 20, 1920.

Continental Candy Corporation, 212 East Austin Ave., Chicago, Illinois.

#### Gentlemen:

For your information we beg to advise you that your recent application for sugar license has been referred for investigation to Mr. A. W. Riley, Special Asst., to the Attorney General of the United States, 555 City Hall Station, New York City.

Please understand that this reference for investigation does not in any way reflect on your business methods but is merely in line with a new policy to investigate applicants for sugar license before issuing such licenses, in order that we may prevent speculators who are not regularly connected with the legitimate sugar trade, to enter the business at this time.

As soon as favorable report has been received, in this office from Mr. Riley, your license will be promptly issued. We suggest that it will greatly facilitate the issuance of this license if you will promptly communicate with Mr. Riley, furnishing him with all facts pertaining to your sugar transactions which he desires to ascertain. [186]

We trust this information may be of service to you.

Yours very truly,
DEPARTMENT OF JUSTICE,
License Station,
By M. M. HEALD.

NOT TRANSFERABLE.

UNITED STATES OF AMERICA. LICENSE.

Continental Candy Corporation, of 212 EAST AUSTIN AVENUE, CHICAGO, ILLINOIS, to engage in and carry on business in foods and feeds in accordance with the proclamations of the President and the regulations prescribed by him, relating to such business, under an act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, or any amendments thereof.

This license is subject at any time to revocation, in whole or in part, or for a limited or unlimited period, for violation by the licensee, or by any officer, agent or employee of the licensee, of any of the provisions of said Act or any amendment thereof or of said regulations now or hereafter in force.

The licensee is required, whenever called upon by the Attorney General of the United States, or his representative, to furnish information and to make reports concerning his business in such details as shall be prescribed, and shall keep such records of his business as shall facilitate the verification of [187] information contained in said reports; and all property, books, records, and accounts of the licensee are at all times subject to the inspection of the Attorney General of the United States or his duly accredited agent or representative.

This license is based upon the statements in the licensee's application, on file with the United States Food Administration, Washington, D. C. All changes, such as change in firm or corporate name, new place of business, or changes in or additions to activities, must be reported immediately.

Dated—September 9, 1920.

(Signed) A. MITCHELL PALMER, Attorney General of the United States.

Mr. BROWN.—Before adjournment this morning, we were asked to produce the copy of the contract, if any, between the plaintiff and the First National Bank of Chicago, with reference to the liability of the plaintiff to said bank on the bank's fulfillment of the letter of credit; and we stated that we had no copy; that the bank had heretofore refused to give us a copy thereof.

I desire to state, on behalf of the plaintiff, that during the noon intermission, Mr. Schneewind, Mr. Fox and myself, spent considerable time in the office of the First National Bank of Chicago, where there was exhibited to us an application blank and the original contract on the subject last mentioned.

I state further that in a conference between Mr. Clifford and the attorneys for the said bank, it was finally decided to give us copies of that contract incorporated on the back of a copy of the letter of credit, as I stated this morning, and a copy of the written application blank, both of which I now produce and offer in evidence; a copy of the contract between the [188] Continental Candy Corporation and said First National Bank, dated June 2, 1920, and the same was received in evidence without objection, and are marked Plaintiff's Exhibits 1 and 2, respectively, and are hereto attached.

(Said documents were then received in evidence and marked, respectively, Plaintiff's Exhibits 1 and 2, and read as follows:)

## Plaintiff's Exhibit No. 1.

B. Chicago, June 2, 1920.

To THE FIRST NATIONAL BANK OF CHICAGO.

## Gentlemen:

Having received from you the Letter of Credit on our account of which the annexed is a copy, for \$300,000.00 U. S. Currency, the undersigned hereby agree to its terms, and in consideration thereof agree to pay you the amount of each acceptance under it, at maturity, in cash, or prior thereto, if you request it, and it is understood by the undersigned that the commission for accepting under this credit is to be 1/8% per cent on drafts at sight sight, plus any charge for confirmation.

The undersigned also agree to pay you the amount of any revenue stamps which you may be required to attach to any acceptances drawn thereunder.

The undersigned hereby give you a specific claim and lien on all goods or merchandise (and the proceeds thereof) for which you may have paid or come under any engagements under this credit, and on all policies of insurance (which the undersigned agree to effect) on such goods or merchandise to an amount sufficient to cover your advances or engagements under this credit and on all bills of lading given for same, with full power and authority to take possession and dispose of the same [189] discretion, at either public or private sale, with or without notice, for your security and reimbursement and to charge all expense, including commission for sale and guarantee. And at any auction or public sale by you hereunder you may bid and purchase as freely as third parties. And the undersigned further agree to give you any additional security that may be demanded. And the undersigned further pledge to you as security for any other liability or liabilities of the undersigned to you, due, or to become due, or that may be hereafter contracted or existing, howsoever acquired by you, any surplus that may remain, either in goods or in the proceeds thereof after providing

for the acceptance under this credit. We further authorize you to cancel this Letter of Credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user; and in case you feel insecure or unsafe at any time, any indebtedness due from you to us may be appropriated and applied hereon as well before as after the maturity of any acceptance then outstanding on account of said Letter of Credit.

Neither you nor your correspondents in ——shall be responsible for any loss arising from any difference in quality or character of merchandise imported under this credit from that stipulated and expressed in the invoice accompanying the drafts, nor for correctness or genuineness of documents, nor for delay or deviation from instructions in regard to shipment.

This obligation is to continue in force and to be applicable to all transactions, notwithstanding any change in the individuals composing the respective firm parties to this contract, or either of them, or in that of the user of this credit, whether such change shall arise from the accession of one or more new partners, or from the death or secession of any partner or partners. [190]

Very respectfully,

CONTINENTAL CANDY CORPORATION,
(Signed) BENJAMIN SCHNEEWIND.

No. G. C. A6385 Paid-up Capital \$10,000,000 \$300,000.00 (U. S. Currency) Surplus. .\$12,000,000

# THE FIRST NATIONAL BANK OF CHICAGO. Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co., San Francisco, Calif.

#### Gentlemen:

We hereby authorize you to value on the First National Bank of Chicago at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each)—99 test, 25 Dutch Standard © \$19.85 per 100, to be shipped to Chicago, Ill.—Shipment from Java, 250 tons in September & 1000 tons in October, 1920.

The Bill of Lading must be issued to the order of Shippers and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before December 31, 1920, and the advice thereof (in duplicate) sent to The First National Bank of Chicago accompanied by Bill of Lading and abstract of invoice, on receipt of which Documents the Bills will be duly honored.

The remaining Bills of Lading with certified Invoices and Consular Certificates must be sent by the Bank or Banker negotiating drafts to ——for account of the First National Bank of Chicago, and a certificate to that effect must accompany draft.

We hereby agree with drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation

California etc. Sugar Refining Co. et al. 229,

[191] at the counter of the First National Bank of Chicago. This credit is confirmed and irrevocable.

Insurance ———.

Drafts drawn under this credit must bear upon their face the words:

"Drawn under The First National Bank of Chicago.

"Credit No. G. C. A 6385 dated June 2, 1920."

If desired, drafts drawn under this credit will be paid at the counter of the First National Bank of San Francisco, Calif.

Respectfully yours,
THE FIRST NATIONAL BANK OF CHICAGO.

## Plaintiff's Exhibit No. 2.

G. C. No. A6385.

## APPLICATION FOR COMMERCIAL CREDIT.

THE FIRST NATIONAL BANK, CHICAGO.

Refining Co. San Francisco,
A/S.

For shipment of ......500 tons (2240 lbs. each) 99 test 25 Dutch Standard @ \$19.85 FOB. San Francisco, duty paid.

To..... Shipt. from Java 250 tons in Oct. and 250 November.

(Deposition of Benjam	in Schneewind.)
Via.:	
Expiration of Credit—	Dec. 31, 1920.
Insurance	
Custom H'se Brokers.	
Special Directions.	
[192]	

Respectfully,

(Signed) CONTINENTAL CANDY CORP. Chicago, Ill.

Chicago, ————, 192—

Mr. BROWN.—We have previously asked the Great Lakes Trust Company for that copy, and they have not given it to us, and we have not any copy, and during the brief noon intermission I had no time to go to their office.

Mr. SCHNEEWIND was recalled to the witness-stand and testified under examination by Mr. BROWN:

My recollection is now refreshed by the exhibition of these documents and I remember that I signed a similar agreement with the Great Lakes Trust Company. I presume that I signed both an agreement and an application which were not identical but were generally along the same lines and for different amounts.

Mr. BROWN.—I will say, that if you will consent to a brief adjournment at the end of the session this afternoon, I will go to the Great Lakes Trust Company and see if I can get it.

Mr. BALLOU.—If you can find it feasible I shall

(Deposition of Benjamin Schneewind.) be glad to have it done. If it is not feasible, of course, you cannot do it.

At this point the witness produced certain records and his cross-examination was continued by Mr. BALLOU.

- Q. You hand me a document with hand written figures on both sides of it, entitled on one side "Materials Used," which runs by months from 1915 to October, 1920, inclusive, with pencil figures on sugar and corn syrup for November, 1920. Now, confining yourself solely to the question of sugar, what do those figures represent under each month? A. Actual use.
  - Q. The actual use of sugar in pounds? [193]
  - A. Yes, sir, in pounds.
- Q. I will conclude from this that the records of the Novelty Candy Company and the Continental Candy Corporation were kept together.
  - A. They were kept together.
- Q. Even after the incorporation of the Continental Candy Corporation? A. Yes, sir.
- Q. Now, reading from this solely on the question of sugar, and solely from May 1, 1919, to date, I read as follows:

#### 1919.

May	269,713
June	257,088
July	344,518
August	705,655
September	789,846
October	732,960

(Deposition	of	Benjamin	Schneewind.)	)
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November			577,059
December			280,948
	1920.		,
January			369,763
February			444,811
March			335,368
April			260,357
May			375,806
June			490,212
July			463,089
August			458,146
September			320,128
October		• -	256,235
November			122,463
47			,

## [194]

The witness continuing: From July, 1919, to December, 1919, the total used amounts to 3,430,986 pounds, and the total from January to June, inclusive, of 1920, is herein stated to be 2,303,317 pounds. Under the Lamborne contracts during May we had 5,000 bags for shipment in June; 5,000 for July; 10,000 for August, and 5,000 for September, each bag containing one hundred pounds.

Q. Now, that your memory has been refreshed as to the date of the application for a license to sell sugar, can you state whether or not you made that application in view of having a possible surplus?

A. Well, we always sold more or less sugar according to our requirements, and under the first instructions from the National Confectioners Asso-

(Deposition of Benjamin Schneewind.) ciation, where it was stated positively that manufacturing confectioners would need no license. But when Mr. Riley was in charge of the sugar distribution, he notified the confectioners that everybody must have a license, and that was in June when this application was made.

Q. Have you any way of fixing the date of the communication from Riley?

A. No, sir. I don't think we had any communication excepting through the Association.

We sold some sugar from January 1, 1920, say, to the end of May. Almost everybody was anxious to get sugar during these months, but we had not sold any—we had set aside a certain amount for our own use which we expected. It was future contracts that we had for sugar under the Lamborne contract.

- Q. But did you during that time sell any sugar that you actually had received and stored?
  - A. No, we didn't.
  - Q. You didn't? A. No, sir.
  - Q. But you did sell contracts for sugar, did you?
  - A. Yes. [195]
  - Q. Is that what you testify? A. Yes, sir.
- Q. You sold from time to time, from your Lamborne contract, sugar you had not actually received?
  - A. Yes.
  - Q. And which you supposed you would not need?
- A. Yes. We sold some to the Western Grocery Company and to Hulman & Co. The only reason that we did not apply for a license was because

(Deposition of Benjamin Schneewind.) it was our understanding that none was necessary at that time.

We had been considering for a long time getting a license, but on the advice of the Association, we did not do it until we found that Riley was in charge, and we thought it necessary at that time to do it, not with the idea of selling any more sugar, but just that if we did come to the point that it was necessary to sell sugar, that we would be in the position under the license to do so. When we were informed that the man in the Attornev General's Department required it, we didn't go around to find out whether he had the right to require it, or whether it was legal that he should require it. We went and did it. We did not not take any legal advice as to whether Mr. Riley's requirements was legal or not. Mr. Hughes, the Secretary of the National Confectioners Association, advised us that it was immaterial whether or not we had a license; but we thought it would be safer by obtaining one. It was a great deal safer in the sugar business if we found a man in authority in the Department of Justice required something, to meet that requirement, even though my personal opinion might be that it was unnecessary. I do not think that during the month of June we sold sugar for future delivery out of this Lamborne contract; although I think the sales were made maybe in June—I have forgotten exactly the time now. We sold some sugar just [196] recently. We only sold three or four lots at different times

between January and June. We sold a number of lots, one hundred bag lots and 200 bag lots, in order to dispose of it subsequent to the 1st of June, during October and November, and some this month. That sugar was actually on hand, sugar that we had on hand in stock. I repeat, we sold three or four lots before the 1st of June. From the 1st of June to the 1st of September, I can't tell you how many lots we sold, but we had sold a good many lots between June and the present time—a good many different lots. We had three or four brokers selling from time to time by 100 pounds or thousand pound bags. When we didn't use as much sugar we began to dispose of it. It was high priced sugar and we desired to reduce our inventory. There was no provision against reselling. In every contract we were free to resell if we wanted to do so. It was before we felt there was a pinch coming in sugar that we sold the three or four lots between the 1st of January and the 1st of June. After we found a pinch was coming, we didn't sell any, not until the business began to fall off again. On the 1st of December, 1920, we were not stocked up with more sugar on hand and under contract. We had no contracts. The last deliveries were made in October on that Lamborne contract, and we had no other contracts outstanding except these. That is all. Those are the only contracts we have; for instance, we replaced, on account of the Lamborne sugar not being satisfactory for some purposes, we replaced, we sold about an equivalent of three

hundred barrels and bought Diamond A at about the same price, to get sugar that we could use for certain purposes; but that was the only purchase of sugar that we have made this year outside of the California and Hawaiian. The Lamborne contract was made last year, and the [197] C. & H. this vear. We had dealt with Seavey & Flarsheim, and through them bought sugar of the California & Hawaiian, a good many years. I know that for the last year or two they have made the practice of practically taking our order and having us sign the contract, and then sending it back to the California & Hawaiian Refinery for their signature. I don't know whether they did that before or not; I don't remember. Seavey & Flarsheim did not purport to sign it themselves as agents of the California & Hawaiian. They came to me and told me they had sugar for sale and asked me to buy it. When we bought it and signed the contract they did not sign it as agents, but always sent it back to San Francisco for confirmation and signature. When Mr. Tennison presented these contracts I had some conversation with him as to the meaning of the quota clause which read as follows: "7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Company from delivery date of these Java Whites until the end of the year." My understanding of that was that they would not deliver us any more sugar for the balance of the year. I did not know that was in the contract

when I signed it on May 14th. I did not make the agreement when I purchased the sugar. I did not know there was any agreement of that kind being made a part of the contract. I did not know it when we made the oral agreement. When Mr. Tennison came out with this form of contract in which that appeared, I read it before I signed it, and this clause struck me at that time, before I signed it, and we had some discussion before I signed it. I understood that it meant that we could not get any more sugar from the C. & H. Refining Company of any kind. Four days after the first purchase was made I had not seen the These contracts were handed to me contract. [198] together. They were dated on different dates, separately, because they were purchased on different dates. When I got the letter of credit from the banks I would have shown the contracts to them, but they did not ask me for them. I read to them only the price and the number of pounds and the delivery. As to the delivery I said September shipment—250 tons for September shipment from Java, and a thousand tons for October shipment from Java. I didn't say anything to the bank about when that delivery would be completed. The First National Bank of Chicago asked me when the letter of credit expired. I said December 31st. My basis for saying that was that I wanted to give them plenty of time to ship the sugar before the letter of credit expired. I don't remember any discussion about the clause in the First National

Bank of Chicago letter "the shipment must be completed," emphasizing that, as well as the bill must be drawn before December 31st, 1920. The California & Hawaiian Sugar Refining Company never raised any objection to the clause in the letter of credit that we sent them, that the shipment must be completed before December 31, 1920. We never had a letter direct from the C. & H. Company from the dates of these purchases. I began to think that on account of changing business conditions, or for other reasons, these contracts might be onerous and hard on us when I considered selling them. I don't remember the date exactly; it was in September some time. I made no suggestions as to modifying the terms of this contract. I did write a letter to Seavey & Flarsheim on it at their request. I am mistaken,—it was written to the C. & H. Company. It suggested that they delay the shipment of the sugar. That letter was written directly to C. & H. and not to Seavey & Flar-That was in August or September, the letter will show. I don't know exactly the date so many things have happened since then. When I said I had an opportunity to sell [199] the sugar through inquiries from Jacques and Ruffner & McDowell, it was September and October, and even last month, that they made these inquiries. I made no request of the C. & H. that I be permitted to sell to them. The letter to the C. & H. was written in reply to Mr. Tennison's coming over to see us and making the change in the sugar. In other

words, they offered to change the delivery of the sugar and give us C. & H. refined in place of Java. That offer was made by Mr. Tennison and Mr. Flarsheim himself. The offer was to substitute C. & H. for the Java sugar, not upon the same date of delivery, but for immediate shipment. In response to that offer thus made by Mr. Tennison, I wrote a letter covering all the facts in that matter. I kept a copy of that letter but haven't it here. I did not request the C. & H. Company to allow us to resell that sugar, because the contract specifically said we were not allowed to. We made other modifications in the contract at their request.

Q. What modifications did you make at their request?

A. Eventually there was none. They offered to make some recommendations which we thought would change the situation, but on account of the less volume of the business we were having, why we couldn't use the sugar. I did write to Seavey & Flarsheim requesting a delay in the shipment, or to the C. & H. Refining Company and I gave my reasons in the letter for delaying it, and I have no further explanation to offer as to why we never asked them for permission to resell. It never occurred to me that the securing of our license of September 9, 1920, might have any possible bearing upon our right to resell. It never occurred to me that the securing of our license of September 9, 1920, if we had communicated that fact to the C. & H. Company, would have had any bearing (Deposition of Benjamin Schneewind.) upon their willingness that we should resell. [200] I can't remember the price of sugar on May 14, 1920, the date of this contract. I can't remember the price on the 18th of May, 1920. I can't remember either the price of refined sugar at New York or seaboard basis, or any other place, on any particular date. I remember approximately what it was by the 1st of December, nine cents. I never gave the C. & H. Refinery any notice that we repudiated this contract.

On redirect examination by Mr. BROWN, the witness testified:

When I say we never gave any notice, I mean that I personally never gave any such notice. notice was given through our attorneys, Brown, Fox & Blumberg, they represented us. I did not give any personal notice. I notified them to bring action against them. I am familiar with the notice that Mr. King gave in writing in San Francisco. The notice which he gave was the notice of repudiation and rescission of the contract on the ground of illegality, among others. I remember now that notice was given to the C. & H. Company. I have forgotten whether it was signed by me or not. In testifying that eventually there was no modification of either of the contracts of May 14, 1920, and May 18, 1920, I did not mean to deny that there was that modification as to the place of shipment, as this is alleged in the bill and admitted by the answer of the C. & H. Company as to the modification by which Crockett was

substituted for San Francisco. My idea of San Francisco or Crockett is just a question of delivery from either point. It would not make any difference. I knew that change was made. I have spoken of Mr. Hughes, Secretary of the National Confectioners Association. He is not a lawyer. He represented the Association at Washington and was a dollar a year man in the Government [201] Service for a time. His position in the United States Food Administration was with reference to I don't know what his position was; I can't remember that. I know he was located in Washington and was trying to help the confectioners all he could to secure their allotment or percentage of sugar that they were allowed. I don't remember what his position was in the Government Service at another time. He was secretary of the National Confectioners Association for a good many He was not in the Government Service and also secretary of the National Confectioners Association at the same time. He was in the service of the National Confectioners Association and not in the service of the United States Food Administration. Mr. Hughes devoted a considerable part of his time after the enactment of the Lever Act in August, 1917, and the creation of the Food Administration, to study and consideration and advice to the candy manufacturers and confectioners. of the proper conduct of their business under the law. He was assisted by Thomas Lennen, who was

(Deposition of Benjamin Schneewind.) the attorney. All the advice he sent out was under Mr. Lennen's instructions and directions.

- Q. In your cross-examination you said at one time that you corresponded altogether with Seavey & Flarsheim Company and not with the California & Hawaiian Sugar Refining Company, and at another time you stated you wrote a letter to the California & Hawaiian Sugar Refining Company. Who corresponded with you on behalf of the seller; the California & Hawaiian Sugar Refining Company or the Seavey & Flarsheim Company?
  - A. The Seavey & Flarsheim Company.
- Q. Did the California & Hawaiian Sugar Refining Company ever address any letter to you?
  - A. No, I don't remember.
- Q. Or to the Continental Candy Corporation with reference to either of these contracts of May, 1920?

  [202] A. No, sir, not that I remember.
- Q. When you were negotiating with the Seavey & Flarsheim Company with reference to the last-mentioned contracts, did any one of them ever ask you whether you had a sugar license?
  - A. No, sir.
  - Q. Or any license from the Federal Government?
  - A. No, sir.
  - Q. Under the Lever Act? A. No, sir.

On recross-examination by Mr. Ballou, the witness testified that he did take the advice of Mr. Hughes, and that Mr. Hughes advised not to take a license; but that in spite of that, he applied for and got a license afterwards, when the change

(Deposition of Benjamin Schneewind.) was made and Riley was in charge; that Riley talked with Mr. Hughes, and he said: "Well, you might just as well get a license."

Upon redirect examination continued by Mr. BROWN, the witness testified that he or his company conferred with Mr. Hughes, to the witness' knowledge, very, very often, prior to June, 1920, and that for a considerable time, for a long time, Mr. Hughes told him that no license was required; that it was Mr. Hughes who told the witness of the coming into office of Mr. Riley and of the different view of Mr. Riley and that was about the same time as the date of the application for the license.

On recross-examination continued by Mr. BAL-LOU, the witness testified that he understood that Mr. Riley had different views on the subject of the license from Mr. Hughes; that he did not understand how recently Mr. Riley had been in the Attorney General's office at the time he made the application; that the witness had never at any time consulted a lawyer directly as to whether he could sell this sugar without a license before June of that year.

On redirect examination continued by Mr. BROWN, the [203] witness testified:

Our lawyers in Chicago are Brown, Fox & Blumberg. We never consulted Brown, Fox & Blumberg in any matter about this contract prior to November, 1920. We did not consult them about the May 14 and May 18, 1920, contracts prior to November, 1920, nor did we ever consult them about

(Deposition of Benjamin Schneewind.) any matter of license prior to the commencement of this suit, and never consulted any other lawyers about a license prior to the commencement of this suit.

Q. You were also asked about whether you know of the recent advent into office of Mr. Riley, and as I understand you, you say you did not know whether he had recently come into office or had been in office quite a while; but did you know or were you informed whether he recently came into office or not. That he recently had taken charge of some branch of the work incident to sugar administration?

A. Yes, sir. I understood that he had been taken from some other branch of the Government and placed in the sugar department.

## Testimony of George J. Tennison, for Defendant Sugar Refining Company.

GEORGE J. TENNISON, called in behalf of the defendant Sugar Refining Company, after being duly sworn, testified as follows:

I reside at Chicago and am the Chicago Manager for the firm of Seavey & Flarsheim Brokerage Company, brokers representing the California & Hawaiian Sugar Refining Company, in the Chicago market, which includes some territory in Wisconsin and in Illinois, outside of Chicago. I have been such representative for five years, and was in that capacity in April and May of this year. I sold Java Sugars of the California & Hawaiian Sugar Refining Com-

(Testimony of George J. Tennison.)

pany during the year, and I sold sugar to the Continental Candy Company under two contracts, dated May 14th and May 18th. [204]

Mr. CAMPBELL.—What protest was made by the Continental Candy Corporation against any clause in this contract?

A. Do I understand you, at the time the sugars were sold.

- Q. Before you made the contract, or at the time.
- A. None.
- Q. None, whatever? A. No.
- Q. Has there ever been any objection on the part of the Continental Candy Corporation to clauses 6 and 7 in these contracts? A. Yes.
  - Q. When? A. Late in November.
  - Q. What was said?

A. In a telephone conversation to Mr. Schneewind, advising him of the arrival of Javas on certain shipments, he then advised me that his attorneys were about to enter—

Mr. PARTRIDGE.—If your Honor please, I will object to any further testimony as to what happened at that time. I cannot see that it is of any consequence.

Mr. McENERNEY.—We simply want to fix the first time that they ever protested in the matter was through this witness in November, and then they said they had their attorneys in San Francisco—

A. (Continuing.)—about to take up the case.

Mr. PARTRIDGE.—Just a moment.

Mr. McENERNEY .- So that they waited until

(Testimony of George J. Tennison.) the middle of November on a falling market before they found holes in the contract—

The COURT.—When the time comes to argue the case we will argue it; until we do that, let us get the evidence in. Just please follow the rule of procedure. What is the objection?

Mr. PARTRIDGE.—My objection to it is that it is entirely immaterial what happened in November in regard to any [205] protest. We allege and there is admitted a rescission of the contract.

The COURT.—I suppose that is true, the fact that they did not make any—if they did not make any at time the contract was entered into, that is all that is material in that behalf; what they might have said afterwards would not change it.

Mr. McENERNEY.—Will your Honor hear me a moment?

The COURT.—Yes.

Mr. McENERNEY.—We have an affirmative defense that on a falling market they made no complaint until November, 1920. That is all we want to prove, the protest, your Honor. Now, if it is admitted that they made no protest—

The COURT.—Mr. Partridge is objecting to the language employed. I don't know whether that would be objectionable or not. I suppose whatever they said, they would be bound by. The objection is overruled.

#### (EXCEPTION No. 4.)

Read the question. (The record was here repeated by the reporter.)

(Testimony of George J. Tennison.)

A. (Continuing.) And made objection in connection with paying the irrevocable letters of credit on presentation of the drafts on these Java purchases, on account of clauses 6 and 7, stating that they were illegal.

Mr. CAMPBELL.—Q. Is that all he said?

A. That is all.

Mr. McENERNEY.—May we fix that date? Did you send the California & Hawaiian a telegram announcing that fact?

A. We sent them the answer the same day that I had that telephone communication with them.

Q. Can you tell us what that date was?

A. I would [206] say it was November 27.

Q. That is the first communication you had with them indicating a dissatisfaction with the contract? A. Yes.

The COURT.—Did I understand you to say that was after you had advised them of the receipt of the sugar in San Francisco? A. Yes.

Mr. McENERNEY.—That is all.

Mr. PARTRIDGE.—No questions.

# Testimony of E. B. Montgomery, for Defendant Sugar Refining Company.

E. B. MONTGOMERY, called in behalf of the defendant Sugar Refining Company, after being first duly sworn, testified as follows:

I am Special Agent of the Department of Justice, Bureau of Investigation, and have held this position a little over three years. I have been

(Testimony of E. B. Montgomery.)

located in San Francisco, all of that time. I was assigned to the supervision of sugar about June or July, 1918. I have been engaged in this work from January 1st, 1920, up to the present time, and am now in the sugar business. I became acquainted with the officers of the California & Hawaiian Sugar Refining Company early in 1920, and am familiar with the purchase of 10,000 tons of Java Sugar White made by that company, and its resale. I had discussions with the officers of the company respecting that resale.

Q. (By Mr. McENERNEY.) Now, from whom did you receive your directions in respect of the matters covered by your dealings with the defendant Sugar Refining Company, so far as it related to the 10,000 tons of Java whites?

A. Mrs. Annette Adams, United States Attorney. Mr. McEnerney here exhibited to the witness the two original contracts involved in the case, dated May 14th and May 18, 1920, and the same were offered and received in evidence, and marked respectively Defendants' Exhibits "I" and "J," [207] and read as follows:

## Defendants' Exhibit "I."

ORIGINAL.
SEAVEY & FLARSHEIM BROKERAGE CO.
326 West Madison Street,

Chicago, Ill. CONTRACT.

In Triplicate. May 14, 1920.

1. The California & Hawaiian Sugar Refining Co., of San Francisco, have today sold, and the Continental Candy Corporation of Chicago, Illinois have today bought the following sugars:

750 tons, each 2,240 lbs. 10% more or less, White Java Sugar at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California; 25 Dutch Standard—99 Polarization.

- 250 tons, 10% more or less, shipment from Java September, 1920
- 500 tons, 10% more or less, shipment from Java October, 1920
- 2. PAYMENT: Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.
- 3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other un-

foreseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

- 4. Any change of import duty understood to be for account of buyer.
- 5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.
- 6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.
- 7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & [208] Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY COR-PORATION,

BENJ. SCHNEEWIND,

President.

Confirmed and accepted.

(Seller) CALIFORNIA AND HAWAIIAN SUGAR REFINING CO.,

L. CAMPIGLIA, Asst. Sales Manager.

## Defendants' Exhibit "J."

ORIGINAL.

# SEAVEY & FLARSHEIM BROKERAGE CO. 326 West Madison Street,

Chicago, Ill. CONTRACT.

In Triplicate. May 18, 1920.

I. The California & Hawaiian Sugar Refining Co. of San Francisco have today sold, and the Continental Candy Corporation of Chicago, Illinois have today bought the following sugars:

50 tons, each 2,240 lbs. 10% more or less, White Java Sugar, at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California, shipment from Java during October, 1920; No. 25 Dutch Standard, 99 Polarization.

- 2. PAYMENT.—Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.
- 3. It is agreed that should strikes, wars, revolutions, accidents, danger of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

(Testimony of E. B. Montgomery.)

- 4. Any change of import duty understood to be for account of buyer. [209]
- 5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.
- 6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.
- 7. Sales of this sugar to manufacturers constitutes their quota of sugar for the California & Hawaiian Sugar Refining Co. from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY CORPORATION,

BENJ. SCHEEWIND.

Confirmed and accepted.

(Seller) CALIFORNIA & HAWAIIAN SUGAR REFINING CO.

L. CAMPIGLIA,

Asst. Sales Manager.

Mr. McENERNEY called the witness' attention particularly to clauses 6 and 7, and thereupon interrogated him and he gave evidence as follows:

Q. And I now ask you if prior to May 14, 1920, you had to do with the officers of the company in respect of the insertion of these clauses in the contracts for the sale of the 10,000 Java white?

A. Yes, but I never saw these contracts.

(Testimony of E. B. Montgomery.)

- Q. But you are tamiliar with the form, are you? A. Yes.
- Q. Did you instruct the defendant Sugar Refining Company that these clauses were required by the Department of Justice to be inserted in all contracts for the resale of that Java white?

Mr. PARTRIDGE.—I will object to that as leading.

The COURT.—Yes, it is very leading. Ask him what he said, if anything.

Mr. McENERNEY.—Q. What direction did you give them, if any, in respect of the classes of buyers to whom that sugar might, under the direction and control of the Department of Justice be sold? [210]

- A. I informed them that the United States Attorney had instructed me that the sale could be made, provided it was sold to manufacturers for manufacturing purposes only, and was not to be resold; also that the manufacturers purchasing the sugar would have to understand that it was their quota of C. & H. sugar for the year, and that the C. & H. would observe that condition.
  - Q. From whom did you get those orders?
  - A. From Mrs. Adams.
  - Q. To whom did you communicate them?
  - A. I communicated them to Mr. Brown.
  - Q. A. A. Brown? A. Yes.
  - Q. Sales Manager? A. Yes.
  - Q. How often were you, from January until June,

(Testimony o'f' E. B. Montgomery.) 1920, in the office of the California & Hawaiian

Sugar Refining Company?

A. I would hate to say how frequently, but I was there two or three times a week, as often as anything came up that made it necessary that I go there.

Q. Did they exhibit to you the sugar that they had on hand and were about to receive, and how it was being disposed of by them—was that a part of the routine of your calls?

A. Not physically, but I was advised all the time of the amount of sugar they had on hand, and of the arrivals, and I received that notice from other places, too.

- Q. And how they were disposing of it?
- A. I was aware of that.
- Q. You say you did not see these particular contracts? A. No.
- Q. Did you know of sales being made to the Continental Candy Corporation?
- A. No, I do not think that I did. I knew of the sale of the 10,000 tons, but as to the Continental Candy Company, I do not think I did know. [211]
- Q. But you knew, were informed, that it was going out only to manufacturers? A. Yes.
- Q. Did Mr. Brown tell you that they were complying with the terms of your notification to him in the sale of that sugar?

A. He told me that they would be complied with.

Mr. McENERNEY and Mr. PARTRIDGE.—That is all.

## Deposition of Mrs. Annette Adams, for Defendants Sugar Refining Company.

(The deposition of Mrs. ANNETTE ADAMS, herein above referred to, was here formally offered by the defendant Sugar Refining Company as a part of its case and was received in evidence. The said deposition was taken on behalf of said defendant in Washington, D. C., on December 21, 1920, before Berenice Broy, a Notary Public in and for the District of Columbia.) Said deposition is as follows:

On direct examination by Mr. Ballou, the witness testified as follows:

My name is Mrs. Annette Abbott Adams, and my present position Assistant Attorney General, former United States Attorney at San Francisco. I now reside in Washington. I was United States District Attorney at San Francisco from July. 1918, to June 26, 1920. During that time as United States District Attorney, I did have something to do with the enforcement of the so-called Lever Act. That work was in the hands of the United States Attorney under direction from the Attorney General. I had special work with reference to sugar. We had a good deal of work from time to time concerning sugar. We had one agent of the Bureau of Investigations, Mr. Montgomery, who spent most of his time looking into the sugar situation; likewise. we had a Fair Trade Board, as it was called, made up of about thirty-five men and women who were appointed by the Attorney General. They assisted us generally in the enforcement work. Mr. E. B. [212] Montgomery is a regular employee of the

(Deposition of Mrs. Annette Adams.)

Department of Justice, in the Bureau of Investigation, who was just assigned by his chief to assist me in that particular line. His relation to me, for instance, during the month of May, 1920, was that he was acting under my direction in investigating all of the various conditions, particularly as they applied to sugar. He went about from time to time, first to the refiner, then the wholesaler, and investigated the retailers who were making too great a margin. Mr. Montgomery was pretty generally in conference with the refiners. Every few days he went to them and the refiners cooperated with us in the effort to equitably distribute sugar.

With my attention called to the clause of the contract between the California and Hawaiian Sugar Refining Company and the Continental Candy Company, the clause being identical in the contracts, and numbered 6, commencing: "Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same and the sales of this sugar to the manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining company from delivery date of these Java whites until the end of the year." I must say that in the beginning I do not recall this particular form. Any statement that I may make will apply generally. I do recall, having refreshed my recollection since talking to Mr. Ballou yesterday, because I found Mr. Montgomery's report that he (Deposition of Mrs. Annette Adams.)
made at the time, which connects up in my mind
these incidents

We were endeavoring, as a part of our work in reducing the high cost of living and enforcing the Lever Act, to bring about the same equitable distribution of sugar that had been had under the Food Administration and the Sugar Equalization Board. There was no legal provision that the sugar should be so [213] distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the business which they had transacted with them theretofore. In other words, each wholesaler, when a particular lot of sugar was ready for distribution, was to have his proportionate share of that sugar. And we were endeavoring to prevent any wholesaler or any retailer or any manufacturer from hoarding sugar; that is, from obtaining a portion or contracting for a greater supply of sugar than he needed for his immediate needs, for his reasonable use, for a reasonable time, which is the language of the Act.

In order to do that, the co-operation of the refiners was necessary and important, and therefore we asked the refiners—not I, myself, because I do not think I consulted with them, but I conferred frequently with Mr. Montgomery, and with Mr. Miller, about this, and they conferred with the refiners, and Mr. Miller and Mr. Montgomery both reported to me from time to time that the refiners were doing that.

Now, I recall that sometime during the spring, and I cannot remember the date exactly, but it was subsequent to the middle of April, because I got back from the East the middle of April, Mr. Montgomery discussed with me the proposition of the Hawaiian Sugar Company selling some Java sugar to some manufacturers in the Middle West, and asked if we could have any objection to that sale. And we were rather hesitant because we felt that probably that was outside of their regular clientele. In other words, by distributing that to Chicago, to send sugar from San Francisco to Chicago, that western sugar dealers and consumers might be deprived of a portion of their allotment.

We took this matter under consideration and there was a [214] discussion on between Mr. Miller and myself about it, and between Mr. Montgomery and myself about it, and finally we agreed that we would offer no objection to their forwarding it if they would see to it that that sugar went into the hands only of the consumer. In other words, that it would not go into speculative channels.

We found about that time that sugar was being shipped ostensibly for California use, and was being re-routed after the cars left San Francisco to some other point, and that there was more sugar going into Chicago, we felt, than Chicago was justified in receiving from the West, because we thought if they were slipping it over on us and getting more than they were justified in receiving

(Deposition of Mrs. Annette Adams.) that they were probably doing the same thing to the other sections.

And, therefore, that agreement was made by the sugar people, that if they sold this sugar that they would see to it that the sugar went into the hands of *bona fide* consumers and not the hands of dealers who would resell it.

Now, my recollection is that these parties regarding whom they consulted with us—but I do not know whether the name was ever mentioned—were bona fide consumers, manufacturers.

In the term "consumer," I include a manufacturer of candy. The ultimate consumer in our idea was the housekeeper and the manufacturer of fruits, canned fruits; we had, of course, them always in mind, and the manufacturer of candies and soft drinks. We regarded them as consumers.

In general the rules and regulations were those that were laid down by the Food Administration, that sugar must go in a direct line from the refiner to the consumer; that if the sugar [215] was sold to a manufacturer, it would go, might go, from the refiner direct to the manufacturer; if it was sold to a wholesaler, it must go from that wholesaler direct to a consumer, or to a retailer, and from the retailer it must go into the hands of a consumer, and that there should be no resale by any person whom that sugar was sold as one in the chain of handlers.

In making the statement that there was no legal requirement, I am just quoting the rules and regulations that come under the unfair practices pro(Deposition of Mrs. Annette Adams.) vision; and then, of course, there was the hoarding provision always in force. That was held to support us by our construction. Our construction was "more than reasonable needs for a reasonable period."

Q. Now, will you, especially while you are discussing that clause, then state what was the reason for the prohibition against resale against a manufacturer of candy?

Mr. FOX.—I want to object, because this witness has not stated that she herself authorized the insertion of that particular provision.

The WITNESS.—However, I only can say in that connection that we objected to the resale by any person who was not a seller.

Mr. FOX.—That is my point.

The WITNESS.—We only consented to this sale to the manufacturer on the understanding and assurance to us that this firm—that this was an ultimate consumer and not a seller.

Mr. FOX.—You have no objection to them selling it, in case they had more sugar, if business went down, and they sold the sugar for less than they paid for it?

The WITNESS.—Well, that was the thing that we had to prevent out there, the keeping of people from buying more sugar [216] than they needed to meet their needs. We did not want any candy manufacturer or soft drink manufacturer to get more sugar than they might have had under the general rules which were issued.

Mr. FOX.—The object of the Committee, you

had no objection to them securing a surplus where, on account of bad business, and in fact business did get bad, they secured a surplus, provided they would sell it for less than they paid for it?

The WITNESS.—That was not our idea, not the idea of our rule. Our rule was to prevent him from securing a surplus, not to prevent him from selling it, but our rule was to prevent him from getting it in the first place.

Mr. FOX.—My point is that you did not prohibit him the right to sell it cheaper, but that it should be in direct line—

The WITNESS.—(Interrupting.) Agreement with the refiners was that the refiners should not sell to persons who were not *bona fide* manufacturers.

Mr. BALLOU.—Q. Well, that is not my understanding.

A. That was the agreement.

Q. And that clause against resale, which was the design of that Act—

Mr. FOX.—Again I object.

The WITNESS.—Yes, that would be my impression.

Mr. FOX.—She did not draw this clause. She did not draw this clause, is my understanding.

The WITNESS.—I never saw this contract, and I do not recall ever having heard of the Continental Candy Company, but I am stating what the probabilities were and what limitations were put upon the Hawaiian Sugar Company in selling this sugar to the Middle West people. [217]

Mr. BALLOU.—Q. And this clause here, as a matter of fact, is in line with those prohibitions?

A. They are substantially the limitations we put upon them.

Mr. FOX.—I object to that—object on the ground that this witness has stated that she has not seen the clause, and that she is just stating the general rules and policy for the office.

Mr. BALLOU.—We are going to back it up with the testimony of Mr. Montgomery.

Mr. FOX.—I should hope that you are.

The WITNESS.—Mr. Montgomery and Mr. Miller are the persons who had direct contact. I know that Mr. Montgomery did, and my recollection is that Mr. Miller did.

On cross-examination the witness testified as follows:

I was present in San Francisco, and it was under my direction that these provisions of the Lever Act were carried out, the Act which was passed in 1917.

Q. And in carrying out the provisions of the Lever Act, you put into effect the provisions of the United States Food Administration insofar as those provisions of the United States Food Administration were necessary in the regulation of the United States Food Administration were promulgated in a set of rules issued for the guidance of the district attorneys; is that true?

A. Well, of course, the Food Administration

(Deposition of Mrs. Annette Adams.) rules were in a sense in effect, were in a sense in effect.

We used them as a guide, and we required that the people should live up to those rules and regulations. Of course, if they wanted to engage in the sugar business, they had to secure a license. censes were issued from Washington, but, [218] of course, application for license renewals in many instances came thru us, and we recommended or refused recommendations that they be granted. Our duties then consisted especially in the enforcing of the provisions of the Lever Act. We really went a little further than that, because we had there the Fair Trade Board, which was a sort of an extra-legal organization which formulated policies, economic policies, policies which we considered economic policies, and we urged upon the public to follow them, and in certain activities we made them.

Q. If your Fair Price Board could formulate policies that they felt were a violation of the Lever Act or a violation of any other act, you didn't follow them?

A. Of course we did not formulate any that we thought were a violation of the law.

Q. I mean the Fair Price Board. A. Not for the Fair Price Board. They co-operated with me.

The witness continuing: Mr. Montgomery is not located there in San Francisco yet. He was just investigating for the Department. I cannot tell you just how much time he put in on the various

(Deposition of Mrs. Annette Adams.) sugar interests. That was his particular business, to watch the sugar trade.

The witness' attention was here called to the Act of December 31, 1919, amending the original Lever Act, which she stated she recalled.

Q. I want to call your attention to the provisions with reference to the free distribution of sugar throughout the United States, and especially the abolishment of the policy of zoning, and the elimination of zones?

A. Yes; that is what I had reference to a while ago when I said that we attempted equitably to continue the allotment [219] that had been followed under the zone system.

Q. After December 31, 1919, you were? A. Yes, and we were this last spring.

Q. But you also at that time had to follow out the provisions of this Act, that sugar should be sold and circulated freely throughout the United States, didn't you?

A. I do not understand your question.

Q. My question is that the provision with regard to the distribution and circulation of sugar—

A. (Interposing.) We tried to distribute it freely and in as fair ratios as possible; in other words, keep anybody from hoarding.

Q. That is my point exactly. If a candy company bought sugar which they would ordinarily need in their business, and there came a slump in business, or for some reason that sugar was on hand so that they could not use it in their business

and they were willing to sell it cheaper than they paid for it, cheaper than the purchase price, there was no objection to them doing such a thing as that, was there?

- A. Of course, you are assuming that they secured a license.
  - Q. I am assuming that they secured a license.
  - A. They could not sell it without a license.
- Q. This provision of the contract that has been read to you providing what should be done—you did not draw that?
  - A. I did not.

The witness continuing: I never saw that before until I saw Mr. Ballou with it.

- Q. And Mr. Ballou showed it to you. And, in your direct [220] examination, you merely referred to the general policies formulated at these conferences between yourself and Mr. H. Clay Miller, Mr. Montgomery, as to what the Department desired to be done; isn't that true, generally, I mean, rather than specific cases? A. No.
- Q. General statement as to what was desired to be done and in doing that you carried out the rules and regulations previously promulgated by the Food Controller and subsequently re-promulgated by the Department of Justice, the Attorney General's office, which got the rules and regulations of the—
  - A. (Interposing.) Yes, Food Administration.
- Q. Those were the rules you had to carry out, and you carried them out? A. Yes.

- Q. And when you—
- A. (Interposing.) Not those alone, but we endeavored, of course, to carry those out.
- A. Oh, yes, we frequently received instructions from the Department of Justice.
- Q. What I mean is that all of the rules and regulations that you attempted to carry out were issued by the Department of Justice?
  - A. Well, but we just helped to-
- Q. (Interposing.) Were there any written orders issued by you? A. No.
- Q. And, embodying in them the terms of this agreement?
  - A. No; we never issued any written instructions.
- Q. Now, with regard to this question of resales within the trade, I call your attention to that provision, which is Rule 6:
- "Rule 6. Resales within same trade prohibited, when—the licensee, when selling food commodities, shall keep such commodities moving to the consumer in as direct line as practicable [221] and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice." A. Yes.
- Q. Under that provision of the regulations, under that item is where you carried out the policies that you spoke of in direct examination by Mr. Ballou that—

- A. (Interposing.) Of course, we couldn't compel—
  - Q. (Interposing.) I am suggesting—
- A. (Interposing.) We requested them only in so far as the law went, without the authority to compel them, but we did request them.
- Q. Now, that provision, if you will note, says "within the same trade, without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer." That proviso provides that resales within the same trade are allowable when they are with reasonable justification. In view of such a provision, I might say as the case made whereby the sugar was resold for a lower price, a lower amount than it was purchased for, and I call to your attention that such a contract would be permitted.
- A. But still we would be interested in knowing as to how that man got that much sugar because he had gotten more than his share of the sugar, and there must be something wrong away back when he got it, so that is interesting only from that standpoint, as to how he happened to get more sugar—
- Q. (Interposing.) But, if he had more sugar than he needed in his business, and the volume of his business had fallen down to such an extent that he would not need it all, then you would allow him to resell the sugar? [222]
- A. There were several instances where permission was requested from us to sell sugar that had over-accumulated.

Q. You say that you had no power to compel them to do these things. I did not get that exactly.

A. I say that many suggestions were made which we had no power to enforce. We made requests which we could not enforce. We could not compel the refiners to say, "We won't sell this person, that person, or the other person," but we could ask them not to sell to John Smith any more than John Smith was entitled to equitably, and that is what we did do. Any wholesaler in San Francisco would certainly have taken all of the sugar that the refiners could put out, and the refiners could have probably sold all of their sugar to Tillman & Boardman, or to any other wholesaler in the city, but we asked them to distribute it to all of the wholesalers who were legitimate wholesalers, in proportion to their trade.

Q. Now, if that—suppose that sugar company insisted upon selling sugar in violation of this policy?

A. Those that did gave it back when we found it out.

Q. You say you had no power, and that you could not compel them to comply with the rules and regulations that you imposed upon them?

A. Well, there is a section of the Food Control Act—

Q. (Interposing.) The Lever Act?

A. (Continuing.) —the Food Control Act. It is in that statute, and I think you can find it right there (indicating).

- Q. Would you say that the Food Control Act compels them to—I mean is there no other manner?
- A. None that I know of except the Food Control Act. Their license, of course, might be taken away from them and that is a pretty good weapon. [223]
- Q. Pardon me, but that is a pretty good weapon. I dare say it was effective. You do not know who drafted—
  - A. (Interposing.) I have not any idea.
- Q. (Continuing.) —those sections in that contract? A. No, I have not any idea.
- Q. And you do not know whether the California & Hawaiian Sugar Refining Company placed those provisions in the contract, do you?
  - A. No, I have no recollection of that.
- Q. Now, with regard to the California & Hawaiian Sugar Refining Company, do you know something about the character of their business? You do not know who they sell their sugar to, or who it is customary to sell their sugar to from Hawaii, and you only know that this went to Chicago?
- A. My recollection is that this was rather a side deal, and that that is why it was taken up with us, because we pretty generally understood about the situation, about the sugar in that district, and the distribution of this Java came up and they consulted with us about it. That is my recollection.
  - Q. They did not consult with you personally?

- A. No, I say "us," with the Department, with the representatives there.
- Q. You personally had no knowledge with regard to the California & Hawaiian Sugar Refining Company's agreement?
  - A. I do not recall that I discussed it at all.
  - Q. Or with their attorneys?
- A. No. I am sure I never did discuss it with their attorneys.
- Q. I might say that Mr. Campbell is their attorney.
- A. I do not recall ever having discussed it with Mr. Campbell, although I might possibly have done so and not remember it, because many times attorneys dropped into the office, [224] and when the South American sugars began coming in there were many questions arising constantly, and sometimes somebody would call me on the phone, and sometimes attorneys would drop into the office, but I have no recollection of Mr. Campbell seeing me.

On redirect examination the witness testified as follows:

- Q. At the time the refiners consulted with Mr. Montgomery as to the special question of the sale of this Java whites, to some corporation, some manufacturing corporation in the Middle West, were you consulted about it by anyone?
  - A. Anyone you mean other than-
- Q. (Interposing.) No, I mean do you recall discussing it with anyone?
  - A. I do not recall discussing it with anybody

(Deposition of Mrs. Annette Adams.) except Mr. Montgomery and Mr. Miller. Now, I might possibly have discussed it with somebody else, but I do not remember.

Q. Why, you did not deal direct with the refiners, and that question was brought to you by Mr. Montgomery?

A. My recollection now is that I told Mr. Montgomery to go and discuss it with Mr. Miller. You know it is the same as the food regulations were. I do not remember the question of this contract arising. But the question we were concerned with primarily, that the refiners were concerned with, was that they could not make a sale unless it met with our approval. I do not know whether or not the California & Hawaiian Sugar Refining Company's business belongs to the business that I have just spoken of, refiners only, or whether they are engaged in other business. I have no recollection as to whether or not they did any more than this block, I mean by reselling. This discussion, as I recollect it, involved some 10,000 tons of sugar. It [225] involved one block—isn't that what you call it?

Q. One load, I suppose.

Mr. FOX.—That is considerably more than is covered in here. There are only 1200 tons in here. That is all we bought.

Mr. BALLOU.—I beg your pardon.

Mr. FOX.—We only bought 1200 tons.

Mr. BALLOU.—1250.

On recross-examination by Mr. FOX, the witness testified as follows:

- Q. I am not sure that I have covered this, Mrs. Adams. In advising Mr. Miller and Mr. Montgomery with reference to this provision about reselling, you followed out—I do not know whether I asked this or not—you followed out this rule six about the resale in the same trade being prohibited; you followed out that rule?
- A. We followed the general principles which probably had their incipiency in the rule, but in any event, the general principles. They did not want the sugar sold to anybody that might buy it, might buy more than they needed, and we asked the refiners and the people whom we considered qualified to see that no man got more than his quota. In other words, that a proportionate amount of sugar was distributed and that there be no more than their ordinary business demanded. In other words, we wanted them not to sell to anybody that would hoard.
- Q. That, then was the test; the test was not to sell to anybody that would hoard?
- A. Not to sell to anybody that would hoard, and of course, in the manufacturing, that they should get no more than they needed for their legitimate manufacturing needs and that no buyer should buy more than his legitimate trade called for. [226]
- Q. Now, then, this discussion about the matter and the manner in which this western company was broached to you, was any discussion had about the matter?

A. I do not understand; I do not know that any discussion was had about this mid-western company. The discussion had with me was about the 10,000 tons of Java sugar to be sold to some Eastern firm. Now, I do not say that I never discussed any particular firm. I never discussed any to my recollection, so I am not connecting this up, this firm. I would say that this discussion was with us with regard to their rights to sell portion of this Java sugar to Eastern manufacturers.

Q. And did they discuss their right to sell to some Eastern houses licensed to deal in sugar?

A. No. Manufacturing purposes is primarily what the discussion was with regard to it.

The witness, continuing: I do not recall whether they asked me whether the manufacturer was also licensed to deal in sugar. I do not recall that question being raised at all. We were asked with regard to selling the sugar to a manufacturing concern, and we regarded them as an ultimate consumer. Of course, we considered them as the ultimate consumer under those conditions. In my use of the word "eastern," I mean anything east of the Rockies, and that includes New York and Chicago. We were having a great deal of trouble in getting sugar enough to distribute on the Coast. Oregon and Washington were pleading for sugar, and the middle western dealers, sugar men, some of them were making perfectly exorbitant offers for sugar, and they were boosting the prices for themselves and for us, too, and we tried to discourage that kind of thing. [227]

The two letters of credit involved in the case, admitted to be correct, were offered and received in evidence, and photostat copies supplied in their place, and marked Defendants' Exhibit "K" and "L," and in photostat copies read as follows:

#### Defendants' Exhibit "K."

\$300000\*

No. G. C. A6385 Capital and Surplus \$22,000.000 \$300,000.00 (U. S. Currency).

THE FIRST NATIONAL BANK OF CHICAGO. Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co., San Francisco, Calif.

#### Gentlemen:

We hereby authorize you to value on The First National Bank of Chicago, at —— sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each)—99 test, 25 Dutch Standard @ \$19.85 per 100 lbs. FOB San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920.

The Bills of Lading must be issued to the order of Shippers and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before December 31, 1920, and sent to The First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice, on receipt of which Documents the Bills will be duly honored.

California etc. Sugar Refining Co. et al. 275

We hereby agree with drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago.

This credit is confirmed and irrevocable.

Drafts under this Credit must bear upon their face the words:

Drawn under The First National Bank of Chicago.

Credit No. G. C. A6385—dated June 2, 1920.

If desired, drafts under this credit will be paid at the counter of the First National Bank, San Francisco, Calif.

> Respectfully yours, C. P. CLIFFORD,

> > V. P.

Countersigned—W. J. STRAND, A. Mgr.

Defendants' Exhibit "L."

GREAT LAKES TRUST COMPANY

Capital Stock, \$3,000,000 Surplus, \$600,000

110 So. Dearborn St.,

Chicago, Ill., June 1, 1920.

California & Hawaiian Sugar Refining Company, San Francisco, California.

OUR COM'L CREDIT No. 1073.

Gentlemen:

For account of the Continental Candy Corpora-

tion of Chicago we hereby authorize you to draw on this bank at sight up to an amount not exceeding \$255,800.00 (two hundred fifty five thousand eight hundred dollars) to cover Dutch standard 25 refined sugar 99% test, to be shipped from Java during [229] September and/or October, 1920.

Your drafts are to be accompanied by plain invoices in triplicate and clean railroad bills of lading to order of shippers and blank endorsed, showing shipment from San Francisco to Chicago—the price to be \$19.85 per 100 lbs. F. O. B. San Francisco.

This credit will remain in force until December 31, 1920, and all drafts must be drawn and negotiated on or before that date.

We hereby agree with the makers, endorsers and bona fide holders of all drafts drawn under and in compliance with the terms of this credit that such drafts shall meet with due honor on presentation at our bank.

Yours very truly,
JOHN W. THOMAS,
Vice-President.
N. G. CHATTERTON,

Manager, Foreign Department.

P. S.—Drafts under this credit may be negotiated, if desired, with the Canton Bank of San Francisco.

N. G. C.

# Testimony of E. B. Montgomery, for Defendant Sugar Refining Company (Recalled—Cross-examination).

E. B. MONTGOMERY, recalled for cross-examination.

I did not tell the California & Hawaiian Sugar Refining Company to insert the provision against resale in any of their contracts for other sugars except this particular 10,000 tons. Mrs. Adams did not show any written order from the Attorney General's office in regard to this sugar. I received verbal notification from her.

The COURT.—Was there any reason in your own mind for differentiating between the contract to be followed in the sale [230] of the refined sugar and the contract to be followed in the matter of Java sugar? Was there anything?

A. No particular thing. The only difference is that with the domestic refined we were aware at all times of their margin, it was being allocated, and we were in direct contact with it, whereas with the Java we were not; it was going out of our territory, and we were afraid of resale. By going out of our territory I mean that it was going to Chicago.

Q. Didn't they ship any of their domestic refined to Chicago?

A. Yes, but you see, there was a stated price on the domestic, and there was no stated price on that is, there was a stable price on the domestic. The refiner's price was always published, and on (Testimony of E. B. Montgomery.)

this Java sugar there was no published price, and they used to charge all kinds of prices, and we were endeavoring to hold them down. I was afraid that the dealers would charge a higher price for this Java sugar than the refined product was bringing in the market. The reason for insisting on this provision was that there was a shortage of sugar and Eastern brokers were endeavoring to buy sugar in San Francisco, and were offering fancy prices for this Java sugar, for both spot and future, and we were endeavoring to prevent hoarding and profiteering. We had an arrangement whereby we could check up every sale, and would notify our Department in the city where it went, giving the names of the purchasers and amount purchased. and the price at which it was sold, and our Department in Chicago, for instance, would pick up that notice from us and would keep track of that sugar, and endeavor to hold them to a legitimate profit.

Q. You were afraid that some of these people in the Middle West would get some of this sugar, were you?

A. No, [231] we did not object to that, but we were afraid they would take our surplus and create a sugar famine here—that is, our surplus of Hawaiian.

Q. (By Mr. PARTRIDGE.) Do you know whether or not this Java sugar was used in households?

A. Of my own personal knowledge, no, I do not.

Q. What do you suppose it was going to be used for when out on the market?

(Testimony of E. B. Montgomery.)

A. A lot of it was used for manufacturing purposes, and I understood, I don't know this personally, that it was used in the Middle West for household purposes.

### Redirect Examination.

Mr. McENERNEY.—Q. You knew, did you not, that that Java white was peculiarly adapted for manufacturing rather than for household use?

A. That was my understanding.

Q. And that if the manufacturers could be required to use it in the preparation of their commodities, to that extent the strain would be lifted from the sugar for domestic consumption?

A. Yes, that was the idea.

Mr. McENERNEY.—Now, Mr. Partridge, you stated this morning that you would waive the question of delayed shipments. Do I understand you that you would agree the shipments were in time?

Mr. PARTRIDGE.—Yes.

Mr. McENERNEY.—It is agreed that the shipments of this sugar were in time.

The defendant Sugar Refining Company then offered and there were received in evidence the two letters below mentioned dated November 30, 1920, which it was admitted had been served by the Continental Candy Corporation on the defendant Sugar Refining Company December 1, 1920. Each of these letters consisted of two pages. The letter which related to the contract [232] of May 14, 1920, was received in evidence as Defendant's Exhibit "M." The first page was marked "M-1" and

the second page "M-2." The letter which referred to the contract of May 18, 1920, consisting of two pages, was marked Defendant's Exhibit "N," and page 1 of the letter was marked "N-1" and page 2 "N-2." These letters read as follows:

#### Defendants' Exhibit "M."

November 30th, 1920.

California & Hawaiian Sugar Refining Co., 230 California St.,

San Francisco, California.

#### Gentlemen:

You will please take notice, and you are hereby notified, that the contract entered into on the 14th day of May, 1920, between you and CONTINENTAL CANDY CORPORATION covering the sale by you of 750 tons (each 2,240 lbs.) 10 per cent. more or less, [233] of white Java sugar, at \$19.85, net cash, duty paid, landed weights, f. o. b. cars San Francisco, California 25 Dutch Standard, 99° polarization; 250 tons, 10 per cent. more or less, shipment from Java September, 1920, and 500 tons, 10 per cent. more or less, shipment from Java October, 1920, as subsequently amended to provide for delivery f. o. b. cars Crockett, California, is hereby rescinded, cancelled and declared to be null and void.

The said contract is so rescinded, cancelled, and declared to be null and void for the reason that the same, and the whole thereof, is illegal, fraudulent, null and void because it is in unreasonable restraint of trade and contrary to public interest

and policy, and because it is in violation of the anti-trust laws of the United States governing trade or commerce among the several states, or with foreign nations, and governing imports into the United States, and for the further reason that said contract is illegal and void in that it attempts to oust the courts of jurisdiction of any controversy concerning said contract.

You are further notified and advised that said contract is unilateral and is, therefore, *nudum pactum* and wholly unenforcible.

Your attention is further called to the fact that said contract fixes no time for delivery to the buyer, either f. o. b. cars San Francisco, or, as later modified and amended, f. o. b. cars Crockett, California, and by reason of said fact said contract is terminable by either party on due notice.

Notice is hereby given you that said contract is terminated and cancelled before any delivery has been attempted by you to the buyer, either at San Francisco or at Crockett.

You are further notified that said CONTINENTAL CANDY CORPORATION hereby rescinds, cancels and declares to be null and void the said entire contract of May 14th, 1920, because you have failed to comply with the material provision of said contract requiring shipment from Java in September, 1920, of 250 tons of said sugar.

You are further notified that any steps taken by you for the enforcement of the said contract, or any part thereof, will be for your own risk, loss and damage, and you are especially notified and advised not to value or draw under any of the Letters of Credit furnished you under said contract.

# CONTINENTAL CANDY CORPORATION. FRANK S. KING, Assistant Secretary. [234]

#### Defendants' Exhibit "N."

November 30th, 1920.

California & Hawaiian Sugar Refining Co., 230 California St.,

San Francisco, California.

#### Gentlemen:

You will please take notice, and you are hereby notified, that the contract entered into on the 18th day of May, 1920, between you and CONTINENTAL CANDY CORPORATION covering the sale by you of 500 tons (each 2,240 lbs.) 10 per cent. more or less, of white Java sugar, at \$19.85, net cash, duty paid, landed weights, f. o. b. cars San Francisco California, 25 Dutch Standard, 99° polarization; shipment from Java October, 1920, as subsequently amended to provide for delivery f. o. b, cars Crockett, California, is hereby rescinded, cancelled and declared to be null and void.

The said contract is so rescinded and cancelled, and declared to be null and void for the reason that the same, and the whole thereof, is illegal, fraudulent, null and void because it is in unreasonable restraint of trade and contrary to public interest and policy, and because it is in violation of the anti-trust laws of the United States governing

trade or commerce among the several states, or with foreign nations, and governing imports into the United States, and for the further reason that said contract is illegal and void in that it attempts to oust the courts of jurisdiction of any controversy concerning said contract.

You are further notified and advised that said contract is unilateral and is, therefore, *nudum pactum* and wholly enforcible.

Your attention is further called to the fact that said contract fixes no time for delivery to the buyer, either f. o. b. cars San Francisco, or, as later modified and amended, f. o. b. cars Crockett, California, and by reason of said fact said contract is terminable by either party on due notice.

Notice is hereby given you that said contract is terminated and cancelled before any delivery has been attempted by you to the buyer, either at San Francisco or at Crockett.

You are further notified that any steps taken by you for the enforcement of the said contract, or any part thereof, will be for your own risk, loss and damage, and you are especially notified and advised not to value or draw under any of the Letters of Credit furnished you under said contract.

## CONTINENTAL CANDY CORPORATION. By FRANK S. KING,

Assistant Secretary. [235]

The defendant Sugar Refining Company then offered and there were received in evidence the three drafts drawn by the Sugar Refining Company

under the two letters of credit for the aggregate amount of \$555,800, and by consent of counsel, a photostat copy of said three drafts on a single sheet took the place of the three original drafts, and said photostat sheet was marked Defendant's Exhibit "O," and was as follows:

#### Defendants' Exhibit "O."

\$111,160.00

San Francisco, Dec. 17th, 1920. No. 291A.

AT SIGHT PAY to the order of California and Hawaiian Sugar Refining Company, one hundred eleven thousand one hundred sixty 00/100 Dollars to pay for sugar shipped to order C. & H. S. R. Co. Notify Continental Candy Corporation as per attached endorsed Bills-of-Lading and invoice. Drawn under the First National Bank of Chicago Credit No. GC A6385, dated June 2nd, 1920.

Value received and charge to account of CALIFORNIA & HAWAIIAN SUGAR REFINING CO.

By P. A. DREW,
Third Vice-President.
By WARREN H. McBRYDE,
Secretary.

[Endorsed]: California and Hawaiian Sugar Refining Company. By P. A. Drew, Third Vice-President. By Warren H. McBryde, Secretary.

To The First National Bank of Chicago,
Chicago, Illinois.

\$188,840-00/100

San Francisco, December 22, 1920. No. 294A. At SIGHT Pay to the order of California and

Hawaiian Sugar Refining Company, one hundred eighty eight thousand eight hundred forty 00/100 Dollars to pay for sugar shipped to order C. & H. S. R. Co. Notify Continental Candy Corporation as per attached endorsed Bills-of-Lading and invoice. Drawn under The First National Bank of Chicago Credit No. GC A6385, dated June 2nd, [236] 1920.

Value received and charge to the account of CALIFORNIA & HAWAIIAN SUGAR REFINING CO.,

By P. A. DREW,
Third Vice-President.
By WARREN H. McBRYDE,
Secretary.

[Endorsed]: California and Hawaiian Sugar Refining Company. By P. A. Drew, Third Vice-Pres. By Warren H. McBryde, Secretary.

To The First National Bank of Chicago,
Chicago, Illinois.

\$255,800-00/100.

San Francisco, December 22d, 1920. No. 295A.

AT SIGHT Pay to the order of California and Hawaiian Sugar Refining Company, Two hundred fifty-five thousand eight hundred 00/100 Dollars to pay for sugar shipped to order of C. & H. S. R. Co. Notify Continental Candy Corporation, as per attached endorsed Bills-of-Lading and invoice in triplicate. Drawn under Great Lakes Trust Co. Com'l. Credit No. 1073, dated June 1, 1920.

Value received and charge to the account of CALIFORNIA & HAWAIIAN SUGAR REFINING CO.

By P. A. DREW,
Third Vice President.
By WARREN H. McBRYDE,
Secretary.

[Endorsed]: California and Hawaiian Sugar Refining Company. By P. A. Drew, Third Vice Pres. By Warren H. McBride, Secretary.

To Great Lakes Trust Company, Chicago, Illinois.

The defendant Sugar Refining Company then offered and there was received in evidence the original of the three orders whereunder the defendant Sugar Refining Company directed the banks to pay the three drafts to Walter B. Maling. By consent of counsel, a photostat copy of said three orders on a single sheet took the place of the three original orders, and said photostat copy was marked Defendant's Exhibit "P," and was as follows: [237]

#### Defendants' Exhibit "P."

C. H.

## CALIFORNIA AND HAWAIIAN SUGAR REFINING CO.

230 California St.,

San Francisco, December 22, 1920.

The First National Bank of Chicago, The First National Bank of San Francisco, Acting as California etc. Sugar Refining Co. et al. 287.

the Agent, Representative and Correspondent of the First National Bank of Chicago, and First National Bank of San Francisco, Acting in Its Own Right.

#### Gentlemen:

Please pay our annexed draft, No. 291A for \$111,160. to Walter B. Maling, or to Walter B. Maling, Special Master, or Walter B. Maling, Special Master for the purposes specified in a certain Order of Temporary Injunction dated and filed December 8, 1920, in Case No. 579, in the Southern Division of the United States District Court for the Northern District of California, Second Division in Equity, of which Order of Temporary Injunction you have heretofore received a duly certified copy.

This is addressed to you jointly and to each of you severally.

CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY. By WALLACE M. ALEXANDER, President.

Fresident

By WARREN H. McBRYDE, Secretary

DYC\*JB. C. and H.

### CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY,

230 California Street.

San Francisco, December 22, 1920.

The First National Bank of Chicago, The First National Bank of San Francisco, Acting as the Agent, Representative and Correspondent of the First National Bank of Chicago, and First National Bank of San Francisco, Acting in Its Own Right. [238]

#### Gentlemen:

Please pay our annexed draft, No. 294A for \$188,840, to Walter B. Maling, or to Walter B. Maling, Special Master, or Walter B. Maling, Special Master for the purposes specified in a certain Order of Temporary Injunction dated and filed December 8, 1920, in Case No. 579, in the Southern Division of the United States District Court for the Northern District of California, Second Division in Equity, of which Order of Temporary Injunction you have heretofore received a duly certified copy.

This is addressed to you jointly and to each of you severally.

CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY.

By WALLACE M. ALEXANDER,

President.

By WARREN H. McBRYDE, Secretary.

DYC\*JB. C. and H.

## CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY,

230 California Street.

San Francisco, December 22, 1920.

Great Lakes Trust Company, (Chicago), Canton Bank, (San Francisco), Acting as Agent, Representative and Correspondent of Great Lakes Trust Company, (Chicago) and Canton Bank, Acting in Its Own Right.

#### Gentlemen:

Please pay our annexed draft, No. 295A for \$255,800.00 to Walter B. Maling, or to Walter B. Maling, Special Master or Walter B. Maling, Special Master for the purposes specified in a certain Order of Temporary Injunction dated and filed December 8, 1920, in Case No. 579, in the Southern Division of the United States District Court for the Northern District of California, Second Division in Equity, of which Order of Temporary Injunction you have heretofore received a [239] duly certified copy.

This is addressed to you jointly and to each of you severally.

CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY, By WALLACE M. ALEXANDER.

President.

By WARREN H. McBRYDE, Secretary. The oath of office of Walter B. Maling, as special master to receive payment of the three drafts, read as follows:

(Title of Court and Cause.)

I, WALTER B. MALING, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of Special Master in the above-entitled suit. SO HELP ME GOD.

#### WALTER B. MALING.

Subscribed and sworn to before me this 22d day of December, 1920.

#### J. A. SCHAERTZER.

Deputy Clerk, U. S. District Court, Northern District of California.

[Seal of U. S. District Court, Northern District of California.]

[Endorsed]: Filed Dec. 22, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [240]

The defendant Sugar Refining Company then offered and there was received in evidence as a single exhibit two letters from the First National Bank of San Francisco to the Sugar Refining Company, dated June 8th and December 10th, 1920, and a photostat copy of both letters on a single sheet was substituted, by consent of counsel, in

California etc. Sugar Refining Co. et al. 291

place of the originals, and said photostat copy was marked Defendant's Exhibit "Q."

Copies of these letters are herein set forth at pages — to —, supra. [241]

The defendant Sugar Refining Company then offered and there were received in evidence two letters, one by the Canton Bank, dated December 1, 1920, and the other by the First National Bank of San Francisco, dated December 23, 1920, to the Sugar Refining Company, and by consent of counsel a photostat copy of these letters on a single sheet was substituted in place of the originals, and said photostat copy was marked Defendants' Exhibit "R," and the same read as follows:

### Defendants' Exhibit "R."

#### CANTON BANK.

San Francisco, December 1, 1920.

California & Hawaiian Sugar Refining Co.,

230 California St.,

San Francisco.

#### Gentlemen:

Re: Great Lakes Trust Co. Credit No. 1073.

In review of the complex question which have lately arisen, we wish to advise you that we are no longer willing to negotiate drafts drawn against the above letter of credit.

We communicated with you regarding it, only as a matter of courtesy to our Chicago friends, the Great Lakes Trust Co. We therefore do not feel justified in deciding any technical questions which might arise at the time drafts are presented. Yours very truly,

E. F. SAGAR,

H.

Manager.

# THE FIRST NATIONAL BANK OF SAN FRANCISCO, Capital \$3,000,000.

Surplus \$1,500,000.

San Francisco, December 23, 1920. California and Hawaiian Sugar Refining Co., 230 California Street,

San Francisco, Calif. [242]

#### Gentlemen:

Replying to your communication of the 22d inst., with which you have presented to us your sight draft, dated December 17, 1920, No. 291A, for \$111,160, and your sight draft, dated December 22d, 1920, No. 294A, for \$188,840, and certain documents accompanying the same, which are described in your said communication, we beg to say:

We make no objection to the sufficiency of these accompanying documents based upon the quality of the sugar therein described, or the date of shipment or place of origin, or with respect to the question whether the duty thereon has been paid, or in other respects, in consideration of the respective guaranties covering each and all of these matters which you have at this time given us.

Replying to your requests that we pay the above described sight drafts, we are willing to comply in all respects with the letter of credit issued by

the First National Bank of Chicago, No. GCA 6385, dated June 2, 1920, in accordance with the terms thereof, and within the time therein provided for payment of drafts drawn thereunder, but not otherwise, and we are willing at this time to pay said drafts but must decline to do so because we are enjoined and restrained from paying the same by a certain order of temporary injunction heretofore made on the 8th day of December, 1920, in a certain cause pending in the Southern Division of the United States District Court for the Northern District of California, Second Division, which cause is entitled "Continental Candy Corporation, a corporation, plaintiff, vs. California and Hawaiian Sugar Refining Co., a corporation, et al., defendants," and which cause is numbered 579 on the files and records of said court. [243]

Replying to your requests that the said above described sight drafts be paid to Walter B. Maling or to Walter B. Maling, special master, or Walter B. Maling, special master for the purposes specified in said order of temporary injunction, we have to say that the making of payment in such manner is not within the terms of said letter of credit, and that no obligations to make payment in such manner have been assumed by any party to said letter of credit, or by ourselves, and that the injunction in terms provides that we are under no such obligation by reason thereof. The reply in this paragraph contained to your communications addressed to the First National Bank of Chicago,

The First National Bank of San Francisco, acting as the agent, representative and correspondent of the First National Bank of Chicago, and the First National Bank of San Francisco, acting in its own right, is made jointly and severally by us in the several capacities described in said communications.

For the reasons above set forth we return to you herewith your said sight drafts and the accompanying bills of lading together with abstracts of invoice and public weigh master's certificates of weights and measures.

# THE FIRST NATIONAL BANK OF SAN FRANCISCO,

By J. K. MOFFITT,

Vice-President and Cashier. [244]

It was admitted that the Sugar Refining Company delivered to the First National Bank on or before December 17, 1920, the additional things that are called for in the quoted matter in Mr. Moffitt's letter of December 10, 1920, which letter is hereinabove set out in full.

It was further admitted that on December 22d, 1920, the defendant Sugar Refining Company presented to Canton Bank a draft drawn upon the Great Lakes Trust Company, with the necessary [245] shipping documents, all in due form, and that payment was refused by the Canton Bank.

It was further admitted that the defendant Sugar Refining Company on December 22d, 1920, delivered to the First National Bank of San Francisco, two drafts drawn with a letter, directing

payment of the drafts, to Mr. Maling, with all necessary documents, in appropriate form; that they examined them overnight, and on the following day, upon demand, and while they were in possession of those documents, payment was refused, and delivered to the defendant Sugar Refining Company their letter of December 23, 1920, It was further admitted that on December 17, 1920, the California & Hawaiian Refining Company delivered to Canton Bank an order for the payment of the money to Mr. Maling, appertaining to the particular draft drawn on the Great Lakes Trust Co., and that at the time of the presentation of the draft, Mr. Maling was then and there present, ready, able and willing to take payment. It was further admitted that the California & Hawaiian Sugar Refining Company presented the first of their two drafts for \$111,160, with all necessary and called-for papers, to the First National Bank on December 17, 1920, and were refused payment.

It was further admitted that in attendance at the Canton Bank on December 22, 1920, and at the First National Bank on December 22d and December 23d, 1920, were the President and Secretary of the California & Hawaiian Sugar Refining Company, clothed with power under a resolution of the Board of Directors, to execute any additional paper which either of the Banks might require in the facilitation of the payment of the drafts, or against any defect or objection thereto, which might be taken by them, in so far as they

could do so with the injunction as it [246] then stood.

The defendant Sugar Refining Company then offered and there was received in evidence the order of temporary injunction dated December 8, 1920, which read as follows: [247]

# (EXHIBIT "C.")

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

## IN EQUITY.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CAN-TON BANK, a Corporation,

Defendants.

## ORDER OF TEMPORARY INJUNCTION.

THIS DAY comes plaintiff by CHARLES LE-ROY BROWN, its attorney, and also come the defendant California and Hawaiian Sugar Refining Co., by Donald Y. Campbell and Garrett W. Mc-Enerney, its attorneys, and the defendant The First National Bank of San Francisco, California, by Cushing & Cushing, its attorneys, and the defendant Canton Bank, by Henry U. Brandenstein, its at-

torney; and this cause coming on to be heard upon the application on the part of plaintiff for a temporary injunction pending the final hearing of said cause and until the further order of this Court, and upon the rule heretofore entered upon the defendants herein to show cause why a temporary injunction should not issue herein, which said rule to show cause was duly served upon said defendants. and each of them; and the Court having read and considered the bill of complaint herein, duly verified by affidavit, and the affidavits of Andrew A. Brown, L. Campiglia, Henry Clay Miller, Joseph C. Atwood, and C. K. McIntosh, presented on behalf of the defendant California and Hawaiian Sugar Refining Co., and filed [248] herein, and the affidavit of L. F. Cadogan, presented on behalf of the defendant The First National Bank of San Francisco, California, and filed herein, and the Court having heard arguments by the attorneys for all the parties present in court;

The Court, for the reason that it finds from the evidence so presented to the Court, without prejudice to any finding upon a final hearing of this cause, that in view of the contracts of sale of sugar entered into between plaintiff and the defendant California and Hawaiian Sugar Refining Co., on May 14, 1920, and May 18, 1920, and in view of the proofs respecting other facts, that there is probable cause to believe that the danger of plaintiff suffering irreparable loss and damage is immediate, because the defendant California and Hawaiian Sugar Refining Co. may at once proceed to collect all or part

of the purchase price of said sugar fixed by said contracts by valuing under a certain Letter of Credit issued on or about June 2, 1920, to said last mentioned defendant by The First National Bank of Chicago, drafts drawn under said Letter of Credit being by its terms payable over the counter of the defendant The First National Bank of San Francisco, California, up to the amount of Three Hundred Thousand and 00/100 (\$300,000.00) Dollars, and by valuing under a certain Letter of Credit issued on or about June 1, 1920, to said defendant California and Hawaiian Sugar Refining Co. by the Great Lakes Trust Company, of Chicago, Illinois, drafts drawn under said Letter of Credit being by its terms negotiable at the defendant Canton Bank of San Francisco, California up to the amount of Two Hundred Fifty-five Thousand Eight Hundred and 00/100 (\$255,800.00) Dollars, and because said banks, or some of them may at once accept and pay drafts so drawn under one or the other of said Letters of [249] Credit:

DOES HEREBY ORDER that the defendant California and Hawaiian Sugar Refining Co., its officers, agents, servants, employees and attorneys, or those in active concert or participation with it, be, and they and each of them are hereby, restrained and enjoined, pending the final hearing of this cause or until the further order of this Court, from taking or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them, from said defendant The First National Bank of San Francisco, California, and from taking

or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them, from said defendant Canton Bank, and from taking or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them from said First National Bank of Chicago, and from taking or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them, from said Great Lakes Trust Company, in so far as any such draft is or any part, or all, of the purchase price of and for any sugar covered by said contracts of May 14. 1920, and May 18, 1920, and from negotiating or assigning or making payable to any third person any drafts drawn under either of said Letters of Credit, except as may be necessary merely for presentation and demand for payment thereof, and that, in the event that the same be negotiated or assigned or made payable to any third person for the purpose specified, the said California and Hawaiian Sugar Refining Co. shall accept full responsibility for all acts of its endorsees and payees, who are also hereby enjoined to the same extent as the said lastnamed defendant is herein enjoined; and that the said defendant The First National Bank of San Francisco and the said defendant [250] Canton Bank, and each of them, and their respective officers, servants, agents and members, and all other persons acting with or aiding them, or assisting them or either of them, be, and they and each of them are hereby, restrained and enjoined pending the final hearing of this cause, or until the further

order of this Court, from paying under said Letters of Credit, or either of them, to or for the said defendant California and Hawaiian Sugar Refining Co. or to any assignee, payee, drawee or endorsee of said last-mentioned defendant, any part, or all, of the purchase price of and for said sugar covered by said contracts of date May 14, 1920, and May 18, 1920, and each or either of them.

IT IS HEREBY ORDERED that nothing herein contained shall be construed to enjoin the defendant, California and Hawaiian Sugar Refining Company from delivering to plaintiff, or offering to deliver to plaintiff, the sugar or any part thereof covered by said contracts of May 14, 1920, and May 18, 1920, or either of them, or from valuing or drawing under the aforesaid Letter of Credit issued by The First National Bank of Chicago on June 2, 1920, or for valuing or drawing under the aforesaid Letter of Credit issued by the Great Lakes Trust Company of Chicago, Illinois, on June 1, 1920, or from doing any act which it, the said California and Hawaiian Sugar Refining Company, is empowered or required to do, or which it has covenanted to do, or which it may be necessary for it to do, under said contracts of May 14, 1920, and May 18, 1920, or either of them, or which it is necessary or proper for it, the California and Hawaiian Sugar Refining Company, to do in order to comply with the terms of the Letters of Credit issued as aforesaid by The First National Bank of Chicago and the Great Lakes Trust [251] Company of Chicago (Illinois), or to comply with the terms of either of said Letters of Credit.

IT IS FURTHER ORDERED that in the event any draft or drafts be presented by the defendant California and Hawaiian Sugar Refining Company, a corporation, to the defendant, The First National Bank of San Francisco, California, a corporation, or to the defendant, Canton Bank, a corporation, for payment under the aforementioned Letters of Credit, or either of them, that nothing herein contained shall be deemed to enjoin the said defendant. The First National Bank of San Francisco, California, or the said defendant, Canton Bank, or either of them, from paying the amount of said draft or drafts to Walter B. Maling, who is hereby appointed Special Master for this purpose as depositary to be held by him subject to the final decree to be entered herein.

IT IS FURTHER ORDERED that in the event any draft or drafts be presented by the defendant, California and Hawaiian Sugar Refining Company, a corporation, to The First National Bank of Chicago, or to Great Lakes Trust Company of Chicago, Illinois, or to either of them, for payment under the aforementioned Letters of Credit, or either of them, that nothing herein contained shall be deemed to enjoin the defendants, or any of them, from requesting said First National Bank of Chicago or the said Great Lakes Trust Company of Chicago, Illinois, or either of them, to pay the amount of said draft or drafts to Walter B. Maling, Special

Master as aforesaid, to be held by him subject to the final decree to be entered herein.

IT IS FURTHER ORDERED that nothing contained in the two paragraphs last preceding shall be construed to require any of said banks to make any such payment to said Walter B. Maling, as Special Master. [252]

AND IT IS FURTHER ORDERED that a writ of injunction issued in accordance herewith upon said plaintiff filing herein security in the sum of Four Hundred Thousand (\$400,000) Dollars conditioned upon the payment of such costs and damages as may be incurred or suffered by any party hereto who may be found to have been wrongfully enjoined or restrained hereby, and also conditioned upon the payment of such damages as may be sustained by any party hereto by reason of this injunction being found to have been erroneously or improvidently granted, with security to be approved by the Court. It is further ordered that the temporary restraining order made and entered herein on December 1, A. D. 1920, be extended and continued in full force and with the same effect as when granted so far and only so far as it restrains the defendant from the commission of acts in respect of which they and each of them are hereinabove enjoined, until the filing and approving of said security, provided said security be filed and approved herein within ten days from this date. and that when said security be filed and approved it be in lieu and substitution of the security given on said restraining order and filed herein on December 1, 1920. It is hereby further ordered that except as aforesaid the said restraining order of December 1, 1920, is hereby vacated and discharged; and, if said security in the sum of Four Hundred Thousand (\$400,000) Dollars be not given within ten days from this date, that said restraining order of December 1, 1920, shall be wholly vacated and discharged.

The Court imposed, as a condition to the entry of this order, that the plaintiff should consent that the defendant California and Hawaiian Sugar Refining Co. may sell at the market any and all of the sugar covered by said contracts of May 14, 1920, [253] and May 18, 1920, and plaintiff in open court consented to the said condition; but nothing herein contained shall be deemed to require said lastmentioned defendant to pursue said course or to sell said sugar.

IT IS HEREBY FURTHER ORDERED that the defendant California and Hawaiian Sugar Refining Co. be required to file herein its answer to the bill of complaint on or before December 17, 1920, and that this cause be set for hearing on December 27, 1920.

The plaintiff in open court has waived, as a condition to the entry of this order, the right to use the length of time for the taking of depositions allowed by the laws of the United States and the equity rules of the Supreme Court of the United States, but has reserved the right to take such depositions as it may need when it employs all possible dispatch and has also reserved the right to

ask for a continuance of the hearing of said cause on December 27, 1920, if after using all such possible dispatch it has not been able by said last-mentioned date to obtain certain depositions needed by it for the presentation of its cause of action, and for meeting any defense which may be raised by the answers of the defendants hereto, and the aforesaid setting of said cause is subject to said reserved rights of said plaintiff.

DONE IN OPEN COURT this 8th day of December, 1920.

FRANK H. RUDKIN, United States District Judge.

[Endorsed]: Filed Dec. 8, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [254]

The defendant Sugar Refining Company then offered and there was received in evidence the bond of the National Surety Company given upon the obtainment of the order of temporary injunction dated December 8, 1920, and the same read as follows: [255]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

## IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a Corporation,

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CAN-TON BANK, a Corporation,

Defendants.

# BOND ON ISSUANCE OF TEMPORARY IN-JUNCTION.

WHEREAS after due proceedings had in the above-entitled action, the above-entitled Court did, on the eighth day of December, A. D. 1920, make, file and enter herein its order of temporary injunction against said defendants California and Hawaiian Sugar Refining Co., a corporation, The First National Bank of San Francisco, California, also a corporation, and Canton Bank, also a corporation, upon the plaintiff filing herein a bond in the sum of Four Hundred Thousand (\$400,000) Dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party hereto who may be found to have been

wrongfully enjoined or restrained thereby, and for the payment of such damages as may be sustained by any party hereto by reason of said injunction being found to have been improvidently granted;

NOW, THEREFORE, in consideration of the premises and of the issuance of said order of temporary injunction, the undersigned, National Surety Company, a corporation organized [256] and existing under and by virtue of the laws of the State of New York and duly authorized to transact a general surety business in the State of California, does hereby undertake in the sum of \$400,-000 and promise that in the event that it shall be finally judicially determined herein that any of the defendants herein have been wrongfully enjoined or restrained by said order of temporary injunction, or that said order of temporary injunction was erroneously or improvidently granted against the said defendants, or any of them, the plaintiff shall pay to said defendants, and to each of them, any and all costs or damages which said defendants, or any of them, may have incurred or suffered by reason of the making and entering of said order of temporary injunction, not to exceed, however, in the aggregate, the aforesaid sum of \$400,000, and the undersigned does hereby further agree that in the event it shall be herein finally judicially determined that any of said defendants have been wrongfully enjoined or restrained, or that said order of temporary injunction was erroneously or improvidently granted as to any of said defendants, the aboveentitled Court may, upon notice to the undersigned of not less than ten days, proceed summarily in the above-entitled suit to ascertain and determine the amount of costs and damages to which said defendant or defendants may be entitled by reason of the issuance of said order of temporary injunction, and which the undersigned is bound to pay on account thereof, and may render judgment against the undersigned for said amount and award execution against it to enforce said judgment.

Sealed with our seal and dated this 8th day of December, A. D. 1920.

NATIONAL SURETY COMPANY,
[Seal] By FRANK L. GILBERT,
Attorney in Fact.

Approved:

FRANK H. RUDKIN, United States District Judge.

[Endorsed]: Filed Dec. 8, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [257] State of California,

City and County of San Francisco,—ss.

On this 8th day of December, in the year one thousand nine hundred and twenty, before me, John McCallan, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the Attorney of Fact of the National Surety Company, the cor-

poration described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as Principal and his own name as Attorney in Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this Certificate first above written.

[Seal] JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California. [258]

The defendant Sugar Refining Company then offered and there was received in evidence pages 180 to 185 of the Attorney General's Report for 1920, which read as follows: [259]

ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR YEAR 1920.

Pages 180 to 185.

## 16. HIGH COST OF LIVING.

(180) When the last annual report was rendered, the division in charge of enforcing the Lever Food Control Act had just been organized. While effective action had been taken under sections 6 and 7 of the food-control act, the amendments to said act had been but recently passed (Oct. 22, 1919), and it remained for this division to organize adequate

means of enforcing the important amendments providing a penalty for profiteering.

It has been explained how the fair-price organizations were brought into existence, and it now remained to strengthen and organize their work in order that they might effectively co-operate with the district attorneys in the enforcement of the act. Profiteering was defined in the act as "the making of an unjust or unreasonable rate or charge" or "conspiracy to exact excessive prices." This broad and general definition required more specific application and definition. The fair-price commissioners were therefore intrusted with the duty of conferring with the trade and arriving at rates, charges, and profits which would be mutually agreed upon as just and reasonable to the trade and to the consumer.

They were also intrusted with the duty of organizing fair-price committees in their respective States. In general it was not found advisable or necessary to re-create the large and extension organizations built up by the Food Administration during the war. In most instances States were subdivided into districts, with fair-price committees functioning in each. [260]

In the organization of these committees care was taken to have all interests represented and to have the consumers always in the majority on fair-price committees. These bodies then met whenever necessary to consider the matter of prices and costs for the triple purpose of advising dealers as to what might be considered as reasonable prices;

second, for the education of the public as to reasonable prices and practices; third, as assistants to the United States attorneys and bureau agents in prosecutions of cases being investigated for prosecution.

It was also apparent that one of the principal circumstances which facilitated profiteering and would render any effort to curb it nugatory was the excessive extravagance that was being displayed by the community at that time. Therefore an intensive campaign was organized to combat this extraordinary extravagance.

The Division of Women's Activities had for its specific aims curtailment of buying, directing of buying energy to necessaries, (181) elimination of waste, running of the home on an efficiency basis, and the use of the Department of Justice "Complaint card."

In order to reach a considerable number of women an organization was necessary. It was thought that much time could be saved by working through schools and other systematized groups, such as clubs, already functioning. These activities were co-ordinated by a chairman appointed in each State to work directly with the central office in Washington. The State organization plan was sent from here and all States were organized in the same manner as follows:

An advisory board composed of a member from each of [261] the following: Fair price committee, clubs, home economics (Department of Agriculture), thrift, schools, publicity, Americanization.

County of district chairmen appointed by the above board, these chairmen forming the State executive committee which appointed all chairmen for cities, towns, etc.

The local chairmen appointed committees as follows: Women's organizations; educational institutions, (a) public, (b) private; churches; publicity, (a) press, (b) speakers; complaint; special.

Thirty-eight pamphlets on various subjects, of which over 1,000,000 were distributed, were compiled by the Women's Division. The following examples will give an idea of their contents:

A platform advocated for adoption to all women's clubs,—

Teach: "More production, more conservation, and more responsibility to the Government," three points which were desired to be taught through our organization.

Do's and dont's on wearing apparel. Suggestions for the care of clothing and for the choosing of appropriate materials and styles when buying.

Do's and dont's on food. Suggestions to aid in saving time and money in purchasing and also in serving food.

Do's and dont's on income. Suggestions for the saving of money through intelligent investments and sane, wise buying.

A letter received from Henry van Dyke expressing his views on the high cost of living, its causes and remedy.

An experience pool in clothing values, a practical way to fight the high cost of living, a sugges-

tion contributed by the Committee on Standardization of Textile Fabrics of the American Home Economics Association.

Information of value for testing, selecting and caring for materials suitable for coats, suits and dresses for ladies and misses. Compiled with the assistance of the Prince School for education for store service. [262]

A bibliography of books on clothing selection and construction, of interest and assistance to all women.

Duties of the committee on complaints were outlined in this pamphlet with instructions as to how to put cards in the hands of the people and to collect them, after having been filled in with desired information, and then how to turn them over to the proper authorities.

"What can our club do to help?" Practical things that a club might do to bring about the reduction of prices.

An outline for the study of clothing budget giving the purpose the arrangement for meetings and programs.

(182) Reasons for using a budget, to encourage the use of the budget by a simple, concrete explanation.

A speech prepared for the use of local speakers, outlining the causes of high prices, the extravagant living of the people of America of to-day, and our desire to remedy these existing conditions.

A bulletin giving figures showing amounts spent

on luxuries in the United States and how they affect our present high cost of living.

Very good suggestions coming in from various State chairmen throughout the country were sent into this office which played the part of a willing clearing house for these and many other good economic ideas so that all might benefit.

Three efficient speakers went out to stimulate interest and create enthusiasm in the work. Innumerable newspaper and magazine articles appeared indicating the results accomplished by the organizations, and thousands of requests came in for literature bearing on the subject of the high cost of living. Many leading magazines published articles on our work from time to time. Movingpicture houses used our slides continually, advertising our aims, and encouraging sane, wise buying. Large meetings were held of the factory and telephone girls, and our speakers presented our work and secured the co-operation of all employees. Large exhibits in nearly all organized States were held at fairs during the fall, showing made-over garments, also home-made dresses and hats trimmed by girls at the various classes held during the summer, preserved fruit without sugar, and other work done by the women in their endeavor to bring down [263] prices. All during the summer and fall months curb, neighborhood and school markets were carried on with great success in many States, and the producer was able to sell his goods direct to the consumer at a great saving.

Resolutions were passed by organizations and clubs all over the country advocating simple living and conservation and co-operation with the Department of Justice in its efforts. "Patch 'Em and Wear 'Em'' clubs were formed, and the old clothes and overall and gingham dress movements were all outgrowths of the general trend of the public thought.

Prior to the passage of the amendment to the Lever Act the original sections of the same had been rigorously enforced. This had resulted in largely discouraging hoarding and manipulation of the market. The seizures and prosecutions referred to in the last report had made it exceedingly precarious for the speculators. There still, however, remained great abuses in the taking of unreasonable profits, and immediately a penalty for profiteering was provided vigorous measures were taken to insure rigorous enforcement. Letters and telegrams were transmitted to all United States district attorneys explaining the nature of the act and the policies of the department (183) relating thereto and directing them to give precedence to this character of cases. This resulted in effective activity on the part of various district attorneys.

There have been 1,049 prosecutions instituted under the profiteering section alone, and in all 2,016 cases under all sections of the Lever Food Control Act. There have been 99 cases under section 4 in which convictions have been obtained.

The following table shows the number of prosecutions instituted under the different sections of the Lever Food Control Act: [264]

Section 4.	Section 5.	Section 6.	Section 9.	Section 15.	Section 25.	Total.
BEEN IMPOSED.  apparel  r commodities unknown	49 Sugar	5 Sugar 6 Flour 1		71 Coal		
Total 99	6	22		7.1	03	Cai
Sugar         296           Meat         51           Wearing apparel         53           Fuel         148           Unknown commodities         108           Restaurants         10           Frour         1           Protatoes         9           Butter         1           Feed         1           Beans         1           Milk         3           Foodstuffs         3           Cotton         3           Section unknown         3	Sugar	12 Sugar 20 Bacon 2 Food produce . 2	H	824 Coal		lifornia etc. Sugar Refinin   
Total 771	ı	12 24	1	824	6	9 6
Sugar         110           Meat         4           Wearing apparel         8           Fuel         20           Unknown commodities         23           Foodstuffs         1           Drugs         1           Flour         1           Section unknown         11	11 11 11 11 11 11 11 11 11 11 11 11 11	Sugar 2		6 Coal	63	o. et al. 315
Total179	-6	2		0		

(184) At the outset of the campaign 8 or 10 of the biggest corporations of the country were subjected to investigation. The results recently received and analyzed have been prepared for presentation to the courts. The most striking illustration of this phase of the department's work is the American Woolen Co. After months of exhaustive research, this company was indicted by a Federal grand jury. (The indictment was demurred to on the ground that the product of this company, woolen cloth, was not an article of wearing apparel within the meaning of the law, which demurrer was sustained by the Federal judge and is now appealed to the Supreme Court.)

The publicity attendant upon this indictment and the facts thereby revealed caused, according to the admission of the company itself, a tremendous cancellation of orders. They used this as a pretext for shutting down their plants for about a month, but then reopened and announced a reduction varying from 18 to 20 per cent with no corresponding reduction in wages.

Investigations have been made particularly of the following specific interests: the sugar industry included cane and beet sugar and growing conditions in Cuba. An investigation of this latter phase of the sugar industry is being made by a fair-price commissioner who made a trip to Cuba for this purpose. Cane sugar producing and manufacturing interests in both Louisiana and Texas were also carefully investigated. Investigations of two large producing companies, the American Sugar Refining Co. and the Utah-Idaho Sugar Co., resulted in the return of indictments which are now pending.

An investigation was undertaken of different branches of the leather industry, including the various phases of leather manufacture from the production to the finished product. [266]

A most exhaustive investigation was made of the clothing manufacturing industry by one of the fair-price commissioners thoroughly conversant with conditions in the trade. This investigation and action taken based upon it was largely instrumental in breaking down the effort to maintain prices by means of the so-called price guaranty.

A general investigation was made of hotel and restaurants by means of questionnaires. This investigation and the activities of our fair-price commissioners was instrumental in causing the revision of menu prices in many cities.

A thorough investigation of the meat-packing business resulted in the indictments of the following packers: Morris & Co., Wilson & Co., Armour & Co., Swift & Co., and the Cudahy Packing Co.

When the work of this division was begun the country was experiencing one of the most rapid rises in prices and living costs in its history. This movement continued for some time, gradually (185) slackening, and the turning point was reached about May, 1920. Since that time prices of practically all of the necessaries within the purview of this act have consistently declined.

The criminal law is at best an imperfect instrument with which to deal with such a situation. The purpose of the department has been to enforce it in such a manner as would be consistent with sound economics. To this end the fair-price committees functioned in such a manner as to bring the interpretation of the act in accordance with sound business principles; the Women's Activity Division functioned to reduce consumption; and criminal penalties were enforced to prevent profiteering and excessive speculation. [267]

Thus it will be clearly seen that the work of the department has not retarded the operation of the economic laws but has accelerated and aided them in bringing the country back to normal conditions.

An important factor has been the action of the fair-price commissioners in inducing patriotic merchants to effect reductions in prices.

Another phase of the department's campaign which is just beginning to be felt is its investigation of the larger corporations. The public little appreciates the practical difficulties of such investigations. It is a simple matter to detect a corner groceryman in the act of profiteering. A purchase at his store, a review of his books, and the department's agent can readily determine whether there has been a violation of the law. The investigation of a big corporation means the employment of numerous accountants, auditors, and agents for many months, careful analysis of the evidence secured, and exhaustive presentation of a vast array of figures to the grand jury. [268]

The defendant Sugar Refining Company then offered and there was received in evidence five telegrams, three addressed by the Sugar Refining Com-

pany to the Great Lakes Trust Company, and two addressed by the Great Lakes Trust Company to the Sugar Refining Company. It was admitted that these telegrams were sent. The telegrams under one exhibit number were marked Defendant's Exhibit "S." They are set forth herein at pp. —— to ——, supra. (The cross-reference herein is to pp. 6 and 7.)

The defendant Sugar Refining Company then offered and there was received in evidence three letters written to it by the Canton Bank dated August 13th, August 24th and October 4, 1920. A photostat copy of these three letters on a single sheet was marked Defendants' Exhibit "T," and said sheet read as follows:

# Defendants' Exhibit "T."

#### CANTON BANK

San Francisco, August 13, 1920.

California & Hawaiian Sugar Refining Co., San Francisco.

## Gentlemen:

Re: Commercial Credit No. 1073 Issued by The Great Lakes Trust Co., Chicago.

Kindly be advised that we are in receipt of a telegram from the Great Lakes Trust Co., Chicago, with reference to the above credit, which reads as follows:

"Refer our letter June first credit ten seventy-three you may accept shipping documents covering C. & H. Standard Granulated Sugar instead of Java Sugar other conditions unchanged." Assuring you of our pleasure to negotiate your documentary bills drawn in compliance with the terms of this credit, we remain,

Yours very truly,

L. V. RAY,

LVR/H.

Accountant. [269]

## CANTON BANK.

San Francisco, August 24, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco, Cal.

Re: Commercial Credit No. 1073 Issued by the Great Lakes Trust Co., Chicago.

#### Gentlemen:

Kindly be advised that we are today in receipt of a letter from the Great Lakes Trust Co., Chicago, Ill., stating that the shipment relating to the abovementioned Letter of Credit will be F. O. B. Crockett, Calif., instead of San Francisco.

Assuring you that we shall be pleased to negotiate your documentary bills when drawn in compliance with the terms of this credit, we are.

Yours very truly,

L. V. RAY,

LVR/C.

Accountant.

### CANTON BANK.

San Francisco, October 4, 1920.

California & Hawaiian Sugar Refining Co., San Francisco.

## Gentlemen:

Re: Commercial Credit No. 1073 Issued by the Great Lakes Trust Co., Chicago.

Kindly be advised that we today received from the Great Lakes Trust Co., the following telegram: "Refer our letter June first credit ten seventythree California and Hawaii Sugar cancel instructions per our telegram August eleven and pay against documents originally specified which should include certificate inspection of Harry Sheramsky three hundred ten California Street, San Francisco notify beneficiary." [270]

In compliance therewith we have cancelled the instructions contained in our letter of August 13, 1920, and have amended the conditions of the credit to comply with the aforesaid telegram.

Assuring you of our pleasure to negotiate your documentary bills when drawn in compliance with the terms of this credit, we remain,

Yours very truly, L. V. RAY, Accountant.

# LVR/H.

The COURT.—The Canton Bank has never answered in this case, has it?

Mr. McENERNEY.—No. Mr. Brandenstein was here this morning.

Mr. BRANDENSTEIN.—I simply appeared for them, really in the nature of a bystander in the matter.

The COURT.—The First National Bank has answered, I see.

Mr. BRANDENSTEIN.—We have not. I would like to have one admission, and that is this, that this letter was sent before the injunction was issued. That is a fact. It happens to bear the same date.

(The letter here referred to is the one dated December 1, 1920, written by the Canton Bank to the defendant Sugar Refining Company, and is hereinabove set forth (herein p. 291 et seq.) as one of the documents constituting Defendants' Exhibit "R.")

Mr. McENERNEY.—I will admit it on your statement, but I want to know how that happened.

Mr. BRANDENSTEIN.—Simply because they had received [271] these instructions from the bank. Mr. Charles Le Roy Brown was down inquiring at the bank.

Mr. McENERNEY.—Where is the telegram from the Great Lakes to them of which you spoke?
Mr. BRANDENSTEIN.—That, I think is in the possession of the bank.

Mr. McENERNEY.—Will you produce that so that we can supply it?

Mr. BRANDENSTEN.—Yes.

It was admitted by Mr. McEnerney that the letter of the Canton Bank dated December 1, 1920, was written and sent to the California & Hawaiian Sugar Refining Company before the complaint was filed, although the complaint was filed on the same day, but was after the rescission.

It was admitted that Mr. Hoover's appointment was on August 10th, 1917, and that on October 3, 1917, the California & Hawaiian Sugar Refining Company was licensed as a dealer in sugar, and ever since has been, and that in 1917 the Sugar Refining Company came to know of Rule 6,

regardless of what it meant, and has ever since been and still is possessed of that information.

Mr. RICHTER.—The First National Bank of San Francisco has filed an answer which is largely a statement that defendant is without knowledge. It does, however, contain some affirmative allegations. Some of those have already been proved. With respect to those which have not been, I will ask counsel whether proof of those matters is is admitted.

Mr. McENERNEY.—What do you understand by "the others"? We admit that the letter from the First National Bank of Chicago was received as alleged. [272]

Mr. RICHTER.—That is, the letter dated June 8, 1920, addressed by the First National Bank of Chicago to the First National Bank of San Francisco, a copy of which is set out in the answer?

Mr. McENERNEY.—June 4, is it not?

Mr. RICHTER.—June 8 is the date of receipt. It is dated June 3, received, I believe, June 8.

Mr. McENERNEY.—Yes, the letter is admitted. It was further admitted upon the suggestion of Mr. Richter that the allegation in the answer of the First National Bank, that the letter of credit was changed in minor respects so as to provide that shipments should be f. o. b. Crockett instead of f. o. b. San Francisco.

The defendant Sugar Refining Company here rested, and there was no rebuttal evidence offered by the complainant, except the above mentioned deposition of J. G. Weatherly. This deposition was

taken on behalf of the complainant in Washington, D. C., on December 21, 1921, before Berenice Broy, a notary public in and for the District of Columbia, and is as follows:

# Deposition of J. G. Weatherly, for Complainant.

Under direct examination by Mr. COX, the witness testified:

My name is J. G. Weatherly. I live at 1414 North Carolina Avenue, N. E., Washington, D. C. I am a lawyer. Approximately during the last year I was employed by the Department of Justice. From November 27, 1919, to November 6th, 1920, I had charge of and personally directed the Fair Price or price organizations throughout the United States. Those Fair Price organizations included Fair Price Commissions. I do not recall that we had anything known as a Fair Trade Commission, but all organizations functioning with a purpose of arriving at fair [273] margins of profit under the Lever Act were under my jurisdiction. were officers superior to me in the work connected with Fair Price Commissions throughout the United States. Howard Figg was my immediate superior; his title is Special Assistant to the Attorney General. He had delegated to him the enforcement of the Lever Act, and all of the phases and duties in connection with the work of the enforcement of the Lever Law. In my capacity as assistant in charge of the Fair Price Commissions throughout the United States, I had correspondence with the va-

rious Fair Price Commissioners and Fair Price Commissions throughout the country. The method of the constitution of the Fair Price Commissions generally followed was, first, to select the State Fair Price Commissioner, and he was selected by consultation, usually, with the governors of the States, the United States Attorneys, and oftentimes, the old Food Administrator, and when we could get them in accord on a suitable person for the Fair Price Commissioner, the appointments were made by the Attorney General. Then the Fair Price Commissioner formed his subcommittees, usually building them up with representatives of the various branches of industry and also with representatives of the public. It was usually these committees were composed of a representative of the retail grocers, retail dry-goods dealers, manufacturers, labor, the general public, and, quite often, the farmers—representatives of the farmers. The Fair Price Committee at California was charged with the duty of reaching conclusions, the duty of deliberating as to fair margins of profit on the necessities of life, as defined by the Lever Act. Sugar was one of those necessities, or so considered by the Department of Justice, in view of the fact that it was presumed to be a food. The chairman of the Fair Price Committee in San Francisco was H. Clay [274] Miller. The Fair Price Committee at San Francisco did not fix the fair price for sugar in May, 1920. At that time the fixing of the fair price for sugar, or any other commodity under the

Lever Act, was a power not possessed by any Governmental agency.

Mr. BALLOU, for Defendant California & Hawaiian Sugar Refining Company: I object to that as a conclusion of law.

The Department of Justice took the position that a fair margin of profit was the only element of price, all that could be established by Fair Price Committees, or by any other agency which the Department of Justice might use in such matters; but sugar was a commodity which, so far as the margins of profits or prices were concerned, was always handled direct from Washington by the Department of Justice, the Attorney General's Office, and was under the direction of Howard Figg, and myself as associate.

Q. Now, did you have any correspondence with the Department, did the Department have any correspondence with Mr. H. Clay Miller about, in May, 1920, that you remember, with reference to fixing the margins of profit with reference to fixing the trade practices in sugar business?

A. There was a discussion with the San Francisco Fair Price Committee, as to whether that Committee should be granted very great powers in the matter of the distribution of sugar and the price of sugar, and all matters connected with dealing in sugar.

Q. What conclusion did they come to about that? Mr. BALLOU.—I object to that question as calling for—not the best evidence. The correspondence

would be the best evidence. The correspondence should be produced and I object if it is not. [275]

Mr. FOX.—What conclusion did the Department come to with reference to this discussion?

The WITNESS.—I personally—

Mr. BALLOU.—Same objection.

The WITNESS.—(Continuing.) Handled the discussion with the California—the San Francisco Committee—and in connection with the other officials associated with me in the work we denied the request of the San Francisco Committee that it have any greater powers than those possessed by any other fair price committee for the reason that the Department of Justice did not consider that it had any powers over the economic phases of the matters covered by the Lever Law, the Lever Law being purely a criminal statute.

Mr. BALLOU.—I object to the answer and ask that it be stricken out as not being the best evidence and think that the correspondence had better be quoted.

I have examined the files of the Department of Justice, at the request of Mr. Fox, recently with reference to this, with reference to any correspondence with the San Francisco Fair Price Committee. I find correspondence with the San Francisco Fair Price Committee, or with officials of that Fair Price Committee, relative to this matter. My answer to your previous question as to what the conclusion of the Attorney General's Office was upon the request of Mr. H. Clay Miller for general authority to fix

prices was based upon the correspondence had with H. Clay Miller, and which I have examined recently. The request of the San Francisco Committee is embodied in a letter addressed to the Department of Justice, addressed to the Attorney General, by H. Clay Miller, under date of May 18, 1920, and a reply thereto which is substantially as heretofore answered by me, as embodied [276] in a letter addressed to H. Clay Miller under date of May 27, 1920.

Mr. BALLOU.—I object to the answer and ask that it be stricken out on the ground that in so far as it purports to state the contents of the correspondence, on the ground that it is not the best evidence.

The correspondence that I have just referred to I would not consider among the public records of the Department of Justice, or more probably perhaps not a part of the public records of the Department of Justice.

Q. I call your attention to a clause in the contract dated May 18, 1920, between the California & Hawaiian Sugar Refining Company and the Continental Candy Company of Chicago, the clause dealing with it being as follows:

"Clause 6. Buyer agrees to use the sugar only for his own manufacturing needs, and under no circumstances to resell the same."

Did the Department of Justice at Washington, either through you or through anyone else connected with the Department of Justice, insist or even authorize, or insist upon or cause to be author-

ized or insisted upon, the issuance of such a clause in the contract for the sale of sugar in California.

- A. No.
- Q. At any time? A. Never at any time.
- Q. I am going to call your attention to this clause, 7, of the sale contract:

"Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Company from delivery date of these Java Whites until the end of the year.

Did the Department of Justice, on May 20, or on a subsequent date, did the Department of Justice authorize, insist upon, or purport to authorize or insist upon the insertion in [277] the contract for the sale of sugar in San Francisco?

- A. No.
- Q. Or anywhere else? A. No.

(The witness continuing:) I stated that I examined the files of the Attorney General's Office with reference to sugar at Mr. Fox's request. I did not find in the files of the Attorney General's office any correspondence at all from Mr. H. Clay Miller of San Francisco, or anybody connected with the Department of Justice, or the Bureau of Investigations, or Fair Price Committee of San Francisco, requesting authority to compel the insertion of these two clauses that I have just had read to me, Clauses 6 and 7 of that contract, in contracts at San Francisco for the sale of sugar. Those clauses were not inserted in any correspondence that I examined in the Attorney General's office.

Assuming that the Fair Price Committee of San Francisco, California, in May, 1920, would have requested permission or authority from the Attorney General's office for the insertion of either of these clauses in the contract for the sale of sugar, our Department would not have authorized the insertion of these clauses in any contract for the sale of sugar, for the reason that so far as any control was exercised it was exercised over the distribution of sugar. It is mostly in the licenses and regulations, and such a clause as that—I am referring to the first clause read, the first clause in the contract, "Buyer agrees to use this sugar only for his needs and under no circumstances will he sell the same," I would refer to the Committee that particular clause since it does not or is not used in connection with resales within the trade. It would directly conflict with the purpose of the Governmental control in that it would tend to interfere with the possible movement of the sugar to the consumer. In other words, [278] should the purchaser under that contract, and referring to that specific clause cited, finding himself with more sugar than his manufacturing purposes required, and sought to dispose of it to the consumer, he would be, if that clause were in the contract, I think he would be prevented from doing that very thing he intended should be done, and such a clause would be very much out of the public interest.

Mr. BALLOU.—(Interposing.) I object to that as a conclusion of law.

Mr. FOX.—Q. I want to call your attention, Mr. Weatherly, to what you referred to as the General Regulations, or were those regulations in general?

A. They were regulations wholly promulgated by the Food Administration.

- Q. When? A. I do not recall the exact date.
- Q. Was it about November, 1917?
- A. Yes; about that time, and subsequently promulgated by the Department of Justice as rules and regulations to govern the dealings of sugar under the licensing provision of the Lever Law. These were promulgated by the Department of Justice after the enforcement of the Lever Law was delegated to the Department of Justice by the President in August, 1917, I think, or about that time—I do not mean 1917, I mean 1919. Some of these points, like this, I am trusting to memory entirely on that particular. Of course, I have not had them verified at all. It was about August, 1919.
- Q. With reference to those various regulations covering the sale of sugar that were first promulgated, as you have stated, by the Food Administration— A. The Food Administration?
- Q. The Food Administration, and subsequently enforced by the Department of Justice, the Attorney General's Office. I call your attention to what is known as Rule 7, "Speculation [279] prohibited"; and I call your attention to Rule 8, "Sales to speculators forbidden," and to one known as Rule 10, "Unfair practices forbidden." I shall

read those various rules that I called your attention to. I will read Rule 7:

"Rule 7: Speculation Prohibited. No broker or other licensee shall buy or sell any food commodity for his own account unless he is also regularly engaged in, and holds himself out to the trade as conducting, the business of distributing such commodity otherwise than on a commission or brokerage basis, or unless he uses such commodities in manufacturing; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institutions."

## And Rule 8:

"Rule 8. Sale to speculators forbidden. No licensee shall knowingly sell any food commodity to a broker or other licensee who is not buying for personal consumption or engaged in using such commodity in manufacturing, or who is not regularly engaged in, and holding himself out to the trade as conducting, the business of distributing such commodity otherwise than on a commission or brokerage basis; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution."

## And Rule 10:

"Rule 10. Unfair practices forbidden. The licensee shall not buy, contract for, sell, store or otherwise handle or deal in any food commodities for the purpose of unreasonably increasing the price or restricting the supply of such commodities, or

monopolizing or attempting to monopolize, either locally or generally, any of such commodities."

Now, in reading those rules, Mr. Ballou, did I read those right? [280]

Mr. BALLOU.—I think, yes.

By Mr. FOX.—Q. With reference to those rules, Mr. Weatherly, were those rules invoked prior to May 30, or May 31st, 1920?

A. Well, those rules remained in force and effect until all license restrictions were withdrawn and outstanding licenses cancelled by a proclamation of the President, which I believe was in the month of November, I think November 15th.

- Q. 1920 A. 1920, yes.
- Q. I call your attention to one of those rules, Rule 6, which reads:

"Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice."

Mr. BALLOU.—I object to the reading of a part of a rule, unless the whole rule is read.

Mr. FOX.—I call your attention to that part of the rule, Mr. Weatherly. What is meant by the term, "within the same trade"; how did the Department construe "within the same trade"?

A. The Department construed the expression "resales within the same trade," or the expression, "within the same trade" as relating to the selling by a dealer to another dealer in the same kind and the same class; that is, a transaction between two

dealers performing identical functions so far as the public is concerned, such as the sale for the purpose of enhancing the price—say one wholesaler sells to another wholesaler, or one retailer to another retailer or even one broker to another broker, where it is for the purpose of aiding in absorbing or spreading out an exorbitant price or profit. [281]

Q. Was there ever any such sales within the same trade where the price at the time of the resale was less than the purchase price?

A. Bearing in mind the purpose of the Act we always construed it, the Department of Justice never objected to such resale. Will that answer?

Q. That answers my question. Was there ever any objection to a candy manufacturer reselling, for instance, one retailer selling to another retailer?

A. I think not if he was licensed, and the Department of Justice issued a great many licenses to candy manufacturers for the express purpose of enabling them to dispose of any surplus sugar they may have had for the benefit of the consumer.

On cross-examination, the witness testified:

I was in immediate charge of the Fair Price Committee during the dates that he specified. During that time the entire sugar business was done under licenses. Up to the President's proclamation, August, 1919, those licenses were issued by the Food Administration. Subsequent to that period of the proclamation they were issued by the Attorney General. And then previous to that time, the restrictions to the issuance of those licenses were per-

formed by the Food Administration, and after that by the Department and the Attorney General. My particular department had nothing to do with the regulation and the licensing as distinguished from the formation of the Fair Price Committees. The matter of issuing licenses and regulations was primarily vested as to authority in the Attorney General, and I think I am correct in saying that by him the authority was delegated—no, that is not correct. Allison L. Newton was appointed by the Attorney General as the attorney in charge of the licensing division, and Mr. Newton had immediate charge of the [282] licensing. I should have to examine the proclamation of August, 1919, before stating whether the proclamation transferred the power and authority theretofore vested in the Food Administration to the Attorney General, because I am under the impression it is, but I could not say definitely without examining the proclamation and refreshing my memory.

Mr. BALLOU.—Q. I will call your attention to the certified copy I have of the proclamation signed November 21st, 1919, and particularly this language:

"The powers and authority heretofore vested in the United States Food Administrator, under the authority of said Act of Congress approved August 10, 1917, and the executive orders and proclamations issued thereunder, in so far as they apply to foods, feeds, and their derivative products, other than wheat and wheat products, are hereby transferred to, and shall hereafter be exercised by the

Attorney General of the United States, who shall supervise, direct and carry into effect the provisions of said Act, and the powers and authority therein given to the President, so far as the same apply to foods, feeds and their derivative products, other than wheat and wheat products, and to any and all practices, procedure, and regulations authorized or required under the provisions of said Act. including the issuance, regulation and revocation, in the name of the Attornev General of the United States, of licenses under said Act relating to foods, feeds and their derivative products other than wheat and wheat products; and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such rules and regulations as may be prescribed by the President from time to time." [283]

Are you familiar with the proclamation? The WITNESS.—In a general way, yes.

(The witness continuing:) I think I have confused the two proclamations. As a matter of fact, I think this is the proper proclamation, and the one I was considering. As a matter of fact, the proclamation I have been testifying to, I think, upon my memory being refreshed now, is the proclamation of November 21, 1919 (a copy of the proclamation of November 21, 1919, was handed to the witness), I think this is the specific proclamation that transferred the powers, and that it is the one I have been referring to erroneously as of

August, 1919. I don't know whether it is proper, or not, but I want to thank you for bringing that to my attention, because it was an inadvertent error. If it be permissible for me to explain now how that confusion came in my mind, the Department of Justice began its work really in advance of the transfer of the powers of the Food Administration for the purpose of getting things in shape, and because, I may say, they wanted to lose as little time as possible and to be ready to begin this work. They really began this work in August, and that is really an explanation of my confusion of the date. And, by the way, I would like to correct another answer I made a moment ago, Mr. Ballou. From September 1, 1920, to November 6, 1920, I was immediately associated with the licensing work, that is, the licensing division, if we may call it such, under the Department of Justice. In other words, I was transferred from the payroll of the Bureau of Investigation to the payroll of the Sugar Equalization Board. The Sugar Equalization Board was still in existence, but really exercising no powers, being that part of the officers of the Department of Justice who had charge of the work in connection [284] with the sugar licensing, and I was put on that roll September 1, 1920, and kept on it until I severed my connection with the Department. November 6, 1920; but during the month of May, 1920, I was not concerned immediately with the licensing provisions, that was not under my depart-

ment. I was concerned with regulation of the licenses as prescribed in the proclamation only in this way, that the Fair Price Committees were charged with the duty of, as far as possible, seeing that the licenses conformed to the Rules and Regulations, and with that idea in mind I issued in-These particular instructions really structions. went out over Howard Figg's signature, but I drew up the instructions to the Fair Price Committees, calling their attention to possible violations of the rules and regulations, and asking them to cooperate in ferreting out and bringing to the attention of the courts violations of the rules and regulations, and co-operate with the recognized officers of the Department of Justice in their districts, such as grand juries, United States Attorneys, and so on. These men were primarily concerned with any violations of the regulations, and the thing I did up to September 1, 1920, with regard to the Fair Price Committees, I merely instructed them to cooperate with them. The chain of authority through the immediate office of the Department of Justice, so far as the information regarding prices is concerned, the authority to prefer charges, and to make findings of fact as to the violations of license rules and regulations, went direct from the Attorney General to the United States Attorneys; they reported such findings of fact direct to the Attorney, General, and such reports were passed upon by A. L. Newton, who approved or disapproved, as the

case might be, and passed them on up for the attention of the Attorney General. [285]

Q. I call your attention to the first clause of Rule 6 of these general rules and regulations, reading as follows:

"The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable, and without unreasonable delay."

Mr. FOX.—Unless we agree, Mr. Ballou, that these regulations were in effect, I shall have to reserve an objection to reading any part of them.

Mr. BALLOU.—I will agree.

Mr. FOX.—I will agree.

Mr. BALLOU.—I am perfectly willing to go out and get certified copies of them. I have sent—

Mr. FOX.—It seems to me that in view of the fact that the depositions are to be taken, we ought to agree on what the facts were. I will agree that these regulations were in effect when you answer the other one.

Mr. BALLOU.—Well, we will presently put them all in. I have sent some certified copies to San Francisco, but we can agree among ourselves. We will agree then.

Mr. FOX.—I agree. Those are sections 6, 7, 8 and 10, as read, and those regulations were in effect in May, 1920.

The witness continuing:

Now, this business of keeping the goods moving to the consumer in as direct a line as practicable,

and without unnecessary delay, was a part of the license rules and regulations as promulgated by the Department of Justice. We always held the consumer to be what is usually spoken of as the "ultimate consumer." I do not think we ever passed on that particular point of whether or not a candy manufacturing company would be considered a consumer of sugar under that clause. I do not remember that ever [286] having been raised. I think that it was understood that they always considered it an industry which should be given fair consideration under the law. But as I understood the regulations of the licensee, in selling sugar under that clause it was not under my particular department prior to September, 1920. We, that is, our Fair Price Committees and our department, did not endeavor to keep retail grocers who could not be licensed under the Act down to a fair margin of profit, because the Act, in limiting margins of profit, does not distinguish between a licensee and one who is not licensed, so they drew no lines.

The matter of fixing fair prices, which really, as I testified to, amounted to fixing fair margins of profit, was one which our particular department exercised through the Fair Price Committees, and licensed them or not, and that was done in a different department, in the Department of Justice, know that that point was raised and brought out, regulations of the licensees under those licenses.

I do not recall any particular occasion in May, 1920, when this matter of the wholesale clause, Rule

6, came up in the Department of Justice, and was brought to our attention. My researches in the files of the Department did not make me familiar with any letter written by Howard Figg in the month of May, 1920, particularly referring to and quoting this wholesale clause handed to me here. I think my examination of the files would reveal such a letter if there had been one. I think my memory of the correspondence would, if that had come up. I think there is correspondence in the files along the line of calling upon the refiners to see that Section 6 is observed, and that there are no resales within the trade. I do not recall any particular letter by date, understand. I merely know that that point was raised and brought out, and that was in the correspondence files which I examined. [287]

Q. You testified that you would consider a proposition of resale, say, to the subject as contained in the clause, contrary to the public interests. Can you state along the same line whether you would consider the acquiring by a candy manufacturing company of more sugar than they needed for manufacturing in the nature of hoarding?

A. If it were deliberately required, if they acquired a surplus supply, an abnormal supply, yes, it would be.

The Department of Justice took steps to prevent such abnormal acquisition of supplies in excess of the real needs of the manufacturers who used sugar in their business, to the extent of warning the candy

manufacturers against acquiring larger stocks than their business and conditions warranted, and to the extent of warning, or, rather, cautioning, or, better still, of asking the co-operation of the refiners in refraining from selling them an abnormal quantity of sugar, or quantities greater than their accustomed demands would warrant.

Now, on that point, whenever the Department of Justice wanted the co-operation of the refiners to do thus and so, and to refrain from doing thus and so, in order the more effectively to control the sugar situation in accordance with the Act, I, or the Fair Price Committee, or both, might call on the refiners in that matter, or it might come from the department, or the United States District Attorney, or Mr. Figg; it might be either the Fair Price Committee, or I had in mind the United States Attorney, or it might be either one, or both, would ask that co-operation. I, personally, never asked the co-operation of the refiners to do any acts or refrain from doing any acts, but the Fair Price Commissioners did occasionally call on them for assistance in certain matters. I think possibly by refreshing my memory from the book I gave you I can find the date on which [288] H. Clay Miller was appointed Fair Price Commissioner at San Francisco, California.

(The witness, after examining the book.) I do not have it here. I have a list of the Fair Price Commissioners here and I thought I had the date of their appointment, but I do not have it. I can

say roughly, the best of my recollection was the late fall or early in the winter season of 1919. That is my best recollection of it. I know that we had a special representative on the Pacific Coast at about that time, and I think that he cleaned up the matter of organizing in California about that time.

On redirect examination by Mr. FOX, the witness testified:

A. L. Newton was stationed in Washington. He was not the District Attorney out in California, or in San Francisco; he was in the same relation as myself with Mr. Figg, associated with or assistant to Mr. Figg. I think maybe he was made special assistant to the attorney general about September 1, 1920. He is not connected with the department now, and I am not.

The case was then closed in so far as the introduction of testimony was concerned, and an adjournment was taken until Tuesday, December 28, 1920, at 8:30 o'clock A. M., for argument, and upon December 28, 1920, after an opening argument by John S. Partridge, Esq., on behalf of the plaintiff, and a reply thereto by Garret W. McEnenney, Esq., and Donald Y. Campbell, Esq., on behalf of the defendants, and a closing argument by John S. Partridge, Esq., the Court from the bench immediately rendered its oral opinion, and ordered a decree to be prepared so that it might be signed at 3 P. M. of the same day. The opinion was as follows: [289]

## CONTINENTAL CANDY CORPORATION (a Corporation),

Plaintiff,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING COMPANY (a Corporation), et al.,

Defendants.

## Oral Opinion of the Court.

The COURT.—I have listened to you, gentlemen, with great earnestness and appreciation of your presentation of this case and also the presentation of your arguments in support of the theories entertained here. I suppose it ill becomes a mere country judge, for that is all that I profess to be, in the presence of such distinguished and able counsel, to question the thoroughness or the completeness of the argument, particularly in a case of this magnitude; but my own conscience is my mentor in all these cases, and I have to do and say the things which my conscience impels me to do and say. In that spirit I am emboldened to suggest that the controlling and decisive feature of this case has not been argued. Now, that is a bold and bald statement, but that seems to me to be the situation.

This sugar was bought in time of war,—war still existing legally, if not actually; we were surrounded and we were hampered by all of the exigencies and efforts and inconsistencies growing out of the

war and the resultant determination on our part to see that the war program was brought to a successful conclusion, and then that we were enabled to effect some sort of a satisfactory readjustment from our participation in the war. [290]

This contract is to be weighed and tested, not by what might have been the situation in the year 1913, or not what might be the situation fifty years hence, when the immediate economic effects of the war shall have passed into history, but what the situation was in the spring and summer of 1920.

The Sherman Anti-Trust Act has but recently been given very careful consideration by me, as I had occasion to indicate this morning, and I have given it the best thought I could under the circumstances obtaining. I confess that you can read certain decisions emanating from the most exalted tribunal in the world, respecting the Sherman Anti-Trust Act, and then you can read other decisions emanating from the same tribunal, and if you are only human you may be led to assert that they do not always seem to be consistent one with another.

But, aside from all other considerations, taking the decisions in the Tobacco case, the Standard Oil case, the Trans-Mississippi case, the Keystone Watch case, and even the Steel Trust case of last spring, as I read them and as I recollect them (remembering particularly the vehemence with which Mr. Justice Harlan dissented in some of those cases, and the approaching virulence with which he indicated that the Supreme Court was reading

into that law that which Congress had definitely and deliberately refused to incorporate into it, to wit, "the rule of reason")—taking all those cases into consideration, and endeavoring to arrive at the proper path to be travelled by us in the construction of the Sherman Anti-Trust Act, it seems to me that the situation resolves itself to this much, clearly lying within the realm of legal indispute; irrespective of the precise and definite and seemingly controlling language of the [291] statute, as the same has been read here this morning, the Supreme Court of the United States, which is really the final arbiter of our destinies in this country, has said that a contract in restraint of trade, of which this is one, if it is anything at all, to be within the prohibitions of the Sherman Act, must not only be in restraint of trade, but it must be so unreasonably—to an unreasonable degree. The only way, or at least one of the most satisfactory ways, in which you can determine what is reasonableness or the unreasonableness of the restraint put upon trade by a contract, is to consider the motive and extent of the contract, consider the circumstances under which it was made, consider what the parties had in mind, what motives served to move them to the end they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effect unreasonable. So measured and tested, if it was unreasonable upon its restraints upon trade, it lies within the prohibitions of the Sherman Law; if not, otherwise.

It is common knowledge, I think, that during the war, and during the period subsequent to the actual cessation of hostilities, the question of the price, and the distribution, and the allocation of sugar in the United States, had been a question of a great deal of importance; it was a question that occasioned considerable thought on the subject-matter. I know that the exertions and the ramifications of the Department of Justice have been multitudinous to an extreme degree with respect to the question of what should be done about the sugar question, as well as how it should be done. In my own Court, during this very year, there have been at least two prosecutions for the sale [292] of sugar, and both of them anterior to the execution of this contract, and having to do with the alleged unlawfulness of the sale of sugar, at prices other than those fixed by Governmental authority; one case, in which there was a conviction, because the men evidently were endeavoring to profiteer upon that necessary of life, and in the other case there was an acquittal because. though the sugar had been sold at an advanced price, in excess of the price fixed by the controlling agency, there was lacking that intent sufficient to make it a criminal transaction, as the jury evidently viewed it. I call attention to these facts merely to indicate that there was a great deal of concern being manifested, publicly and privately. with respect to how sugar might be dealt with, to whom it might be sold, under what circumstances

it might be delivered to this, that and the other place, and the prices which might lawfully be exacted for it.

I know that down in Los Angeles—and I am assuming that the same conditions obtained here-for a long time sugar was sold only in small packages; you could get only one or two pounds at a time, and that, frequently, only in connection with a stated amount of other groceries. I know that I have made more than one journey to a grocery store, at the behest of my wife, to buy a lot of other things we did not need-at least at the moment-in order that we might become possessed of a sufficient amount of sugar to satisfy the requirements of the day. So that everybody understood, whether it was lawful or unlawful, whether the Government had the power to impose restrictions and enforce them, or not, or whether we knew it all, or not, or whether we were proceeding along a path that was wrong economically; irrespective of what may have been the true solution of those problems and the true answers to those questions, we were going through a long and elaborate effort to endeavor to provide [293] people with sufficient quantities of sugar to meet their requirements, the requirements of their normal appetites. At the same time, the effort to accomplish that, we were limiting the sale, the transportation, the allocation of sugar very materially and substantially. And most people, I think, were accepting it in the same spirit with which it was tendered.

It is in evidence here that at the time these con-

tracts were made sugar was on a rising market,and on a rising market due to a then present, or confidently expected, scarcity of sugar. It is obvious that that was the case; there was not enough sugar to go around. Some concerns, some individuals, or some territories had to be limited. know that we had a Fair Price Commission down in Los Angeles, and they were very busily engaged in the matter; unusual efforts were being made to see, not that a few people got all of the sugar, but that everybody got some of the sugar, if that could be made possible. Under those circumstances, the Fair Price Committee in this community apparently—the United States Attorney acting in co-operation with the committee here indubitably-conveyed information to this vender of sugar that it might sell 10,000 tons of Java white sugar under certain limitations, the limitations contained in the contract.

It is of course difficult for one to read another's mind, but my own judgment is that the intent of the parties, particularly the Government agencies involved, no less than the aim and purposes of this clause in the contract was primarily, not to prevent the further disposition or the subsequent sale of this particular sugar, but to place such an inhibition upon its subsequent sale as that the buyer originally only buy the amount that he, himself, actually required; and it was in [294] furtherance of what I conceive to be a very commendable plan on the part of those who gave their best thought to the matter, that sugar should not be hoarded, should not be used

unwisely, and that concerns should not, in view of the growing scarcity, become possessed of amounts of sugar outside of and beyond their real requirements, and which they might thereafter, it being in excess of their requirements, make a sale of to their great profit and to the very considerable detriment of the purchasing public.

If this contract had been entered into in normal times, and if this defendant—this vender of sugar, -had inserted this clause in the contract with the intention on its part to prevent a subsequent sale of this sugar in order that it, itself, thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar, I would be disposed to give very careful consideration to the argument advanced here to the effect that it is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. It is not a time of peace, it is not a time for the normal operation of usual economic laws; it is a time of war, a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known, and it was a time when everybody was trying his best, was using his faculties to the very best advantage, to see if we might not be able to provide for the distribution of the necessaries of life, of which sugar is one, in such form and fashion as to prevent some considerable menace to the maintenance of social integrity, social harmony and well-being in our midst.

People wanted sugar, as they wanted other things; and the aim [295] of the Government, which was concerning itself with the peace and quiet of its people, no less than in the maintenance of its perpetuity, obviously was to interest itself as best it might in the distribution of sugar, along with other things, in order that no substantial injustice might be done, and that the greatest number of people who were craving the article might meet with satisfaction.

Under these circumstances, the Government indicated to these parties that this sugar could be sold lawfully, and, therefore, sold at all, only if this clause providing for its use by the vendee and against its resale to any other person were inserted in the contracts. It seems to me that under such a state of facts, for this Court now to hold that the clauses thus inserted were unreasonable in their nature, so unreasonable as within the terms of the Sherman Anti-Trust Act to invalidate, and nullify, and render absolutely and completely void the entire contract, would be to attempt the consummation of a thing under the guise of law which really would have no law, or reason, or justice to support it, and would tend to make of this Government not a government of law, but a government of men.

There is no evidence in the case that I can see, of any attempt, any malevolent motive on the part of this vender of sugar, to do anything other than comply with what it and everybody else at the same time understood to be the lawful, and the reasonable, and the proper, and the apt demands of Governmental authority. Under those circumstances, to hold that in so doing, it must, now in virtue of what has transpired, meet the loss that has been sustained here, an amount in excess of three hundred thousand dollars, would be to work out such an obvious injustice as to shake the very foundations of the social structure [296] which we have erected here in our midst, and undermine the confidence of men in government that it will see that private right is maintained and lawful engagements entered into are made good.

Now, the truth of the whole thing is easily apparent; this case is here because sugar went down and there was no thought of getting it here until sugar had gone down. If this contract was voidand that is the argument of counsel for the plaintiff—because of the inclusion of this clause in it, then, of course, it was wholly void-void at the behest of the defendant in the case; it would have been void in the event of a continued rise in the market, and a refusal on the part of defendant to deliver the sugar would have been void if the plaintiff had brought suit for damages for such refusal. If it was void in one case it was void in the other. I can but faintly imagine the vehemence that would have been indulged here in this Court in support of the argument on behalf of the present plaintiff that such a clause, entered into under such circumstances, should not suffice to enable one to escape the just consequences of his reasonable and voluntary engagements.

But the shoe is on the other foot; the price of

sugar having gone down, these people now seek to escape from the consequences of an unwise move on their part, the purchase of more sugar, really, than they needed in their business. The candy business also went down, as shown by the depositions here. There was less sugar needed by it after the purchase than previously. Not only was there less sugar needed, but there was more sugar to be had, and, therefore, the price went tumbling down. Five or five and a half months after the contract was entered into—five and a half months, after they had had time to look it over carefully, five and a half months, no doubt, [297] after it had been well thumbed by all of their various functionaries, for the first time they came to the conclusion that it was an unlawful contract, an invalid contract, one that shocks the public conscience and is opposed to public policy, one that would result in creating an unreasonable restraint upon trade; and after the sugar had been brought across the wide stretches of the sea and landed ready for delivery, and the price has gone down, and no opportunity to recoup at all any of the tremendous loss which might have been overcome if an intimation had been conveyed to the defendant three or four months previously, it is now proposed that this loss shall be borne, not by the buyer of the article who bought too much, but shall be borne by the seller of the article, who was merely trying to provide that which society was demanding of it, and in a way then deemed least inimical to the welfare of society.

Aside from the fundamental disposition which I think should be in the breast of every man who expects to engage and continue in business in the United States of America—the disposition to live up to his contracts once he has entered into them-I think there ought to be the further but equally prevalent disposition to take one's loss, when it comes, like a sport; and whether it be a loss of \$300,000, as here, or a loss of fifty cents—having over-purchased, having over-bought, having failed to guess with becoming perspicacity as to the future, if one would contribute something to the wellbeing of our civilization, he will not seek to avoid such a contract as that, one entailing a loss because of his want of foresight, because, forsooth, on the narrow ground that five months after he entered into it he got advice that it was unlawful. He should bear his loss—bear it like a man—even if the bearing of the loss means bankruptcy. [298] Unwelcome bankruptcy may be accepted with honor; unwarranted repudiation, however, is a continuing badge of dishonor. To do the honorable thing at all events, even in the face of loss, is a part of the game; it is a part of the burden. And it seems to me that it is the burden that ought to be maintained by the plaintiff in this case.

I am not so sure that this clause to which we have been referring is a severable clause. I have not had time to go into the authorities in respect to that. I entertain no final opinion respecting that phase of the case, but I am rather of the belief that with respect to a clause that in normal times would be so closely allied to the prohibitions of the Sherman Anti-Trust Act, the Court should be loth to hold such a clause so at variance, seemingly, with the provisions of that act—aimed and intended to benefit the public—as a severable clause and one not sufficient, in itself, to invalidate the contract as a whole. But that becomes unnecessary further to consider, and need not enter into the determination of the case at this time, because of the reasons I have endeavored to state here, that, under the circumstances surrounding the transaction, the clause is in no wise an impingement of the law as laid down by the Supreme Court in its construction of the Sherman Act.

For these reasons, gentlemen, I am of the belief that there is no occasion or propriety for this Court at this time to seek to prevent the just consequences of this lawful engagement, lawfully entered into, from falling where they will.

The decree will be in the usual form. Counsel will prepare one, so that I may sign it and enter it this afternoon, before my departure.

The above opinion was revised and a statement of facts added, and in revised form appears in 270 Fed. page 302. [299]

After the opinion had been given the following colloquy occurred before the Court:

Mr. McENERNEY.—If your Honor please, in the final decree, will your Honor direct that the order for the temporary injunction of December 8th be vacated and set aside.

The COURT.—The decree will be in the usual form and you will prepare one so that I may sign it and enter it this afternoon before my departure from the city.

Mr. McENERNEY.—There are two or three other matters I would like to suggest to your Honor.

The COURT.—This case has now been heard upon its merits.

Mr McENERNEY.—Yes, your Honor, and I am speaking of a final decree.

The COURT.—That requires merely a dismissal of the bill.

Mr. McENERNEY.—There are two or three other matters that I think should be covered, for our full protection.

The COURT.—Probably so, and those will be taken care of if you incorporate them in the decree.

Mr. McENERNEY.—At what hour may we return here?

The COURT.—At two o'clock. Were you going to say something, Mr. Partridge? What were you going to suggest?

Mr. PARTRIDGE.—I was going to suggest, if your Honor please, that we be allowed a couple of days in order to notify the Chicago people with regard to this decision, in order that they may take such steps as they may be advised. Mr. Fox is here from Chicago, representing the regular attorneys for the Company in Chicago. Mr. Brown has been in charge of the case, but he was not able to be here at this hearing. Mr. Lillick and myself are not advised as to what steps they may wish to take.

[300] The letters of credit do not expire until Friday night.

Mr. McENERNEY.—It will not answer our purpose, if your Honor please, if your Honor should leave here without entering the final decree. was distinctly engaged upon your Honor's categorical and explicit question that this case should be finished to-day and decided by your Honor, as you intended to go home. Time is running. Inadvertencies might occur. The Continental Candy Company can be advised of this decision and it can take any course that it pleases. We ask that the order of December 8, 1920, granting an injunction, be vacated and set aside: that the final decree contain an order that the defendant will be permitted to move against the National Surety Company under its undertaking filed herein December 8, 1920, as it may be advised, and that the final decree shall operate to transfer to our client and to reinvest it with whatever rights were by it transferred to Mr. Maling, and that, in addition, that at its request, Mr. Maling be authorized and directed to execute an appropriate or necessary instrument to evidence or to effect that reinvestment. Those are the three things, your Honor, in addition to the formal final decree, we would like to have your Honor enter therein. I may say to your Honor that we have a rule of court here which provides that every undertaking must contain a clause wherein the obligor agrees that any party to the action may on a ten day notice apply to have its liability adjudged and the amount fixed and

a judgment entered for that amount, and in an opinion by Mr. Justice Brandeis in 243 U. S., be upheld a similar clause and in a footnote cites all of the statutes and decisions where those clauses come into effect. That would be an appropriate provision to insert here at the foot of this decree. We ask [301] that if your Honor please, so that it shall not be hereafter argued, that by entering the final decree it was intended to cut off that right.

We wish this afternoon to present to the San Francisco banks our letters of credit and the shipping documents so that nothing shall happen to breach this engagement.

We got notice on December 1st that they repudiated their contract and they brought this suit and tied us up. Now the day of reckoning has arrived, your Honor has reached a conclusion, and we ask that judgment be entered in accordance with the conclusion which your Honor has reached.

Mr. PARTRIDGE.—Of course the defendant is entitled under your Honor's belief, supported by your reasons given, to a judgment, but I will submit that there is no necessity of any such haste as counsel suggests. This plaintiff is two thousand five hundred miles away. I will submit that a delay of a couple of days is not an unreasonable delay to ask.

The COURT.—Let me ask you this, Mr. Partridge. What could the plaintiff do?

Mr. PARTRIDGE.—I suppose they could arrange for their appeal. Perhaps make anapplication to the Court for a *supersedeas*. I am not ad-

vised as to everything that might be done.

The COURT.—Of course that is true, and if the Circuit Court of Appeals should grant the *super-sedeas*—that would be for them to determine. This Court has said now and is firmly of the belief that you are not entitled to the equitable relief that you seek here, and that the equitable relief which here-tofore has been granted to you has been granted improperly. That is the present belief of the Court.

Mr. PARTRIDGE.—Very true, your Honor; but in all cases, with deference to your Honor, there are differences of [302] opinion.

The COURT.—I understand that. I understand that mistakes have been made.

Mr. PARTRIDGE.—Yes, your Honor, and that is the reason why there are courts of appeal established by the Government and by the State.

The COURT.—Do you know of any instance though where the trial Court discharged an injunction or declined to grant an injunction, that the Circuit Court of Appeals has granted an injunction?

Mr. PARTRIDGE.—I do know of a great many in the State Courts, your Honor. Your Honor will remember that in the Pasadena case there was an injunction continued in force to maintain the status quo pending appeal.

The COURT.—I don't know what the attitude of the defendant might be. Of course I have never regarded myself as infallible, and I might be mistaken in this instance. If some sort of an agreement could be made whereby this money could be deposited with the Court and some arrangement made to take care of interest on it until the matter is adjudicated, I have no doubt that such an arrangement as that could be made here. I do not know but what the defendant would be willing to make such an arrangement. I do not know anything about it. But I suppose it might be willing to co-operate to any reasonable degree. They are entitled to the money and they are entitled to its use under the views of this Court.

Mr. McENERNEY.—But if they appeal, and if your Honor is wrong, we are amply able to respond. That is all there is to it.

The COURT.—But there is a question though as to whether [303] or not if they should appeal this particular case and it should be determined that this Court is wrong, there is a question, I say, whether or not that would give them the relief financially which they seek.

Mr. McENERNEY.—I cannot conceive, if your Honor please if it were adjudged at the moment they filed the bill that they were entitled to relief pendente lite through the mistakes of a judicial officer, the money passed into the hands of the defendant, the defendant would not be liable for it under settled usages and principles. And in paragraph 3 of their Bill of Complaint they proceed on that assumption, if your Honor please, because they ask that if the money be paid pendente lite, they be awarded it.

The COURT.—I think that under accepted principles of law they have a valid cause of action at

law here if their contention be a rightful one.

Mr. McENERNEY.—There is a celebrated case on that subject, your Honor.

The COURT.—That is my own belief. Of course, the element in this case—and I didn't take time to go into it because it was unnecessary—which should claim the attention of the chancellor is that the sum involved is so large that the deprivation of that sum to the plaintiff might, if the contract be ultimately held to be an unlawful one, work such irreparable injury to the plaintiff that a court of equity should step in and intercede. It is my present belief that that is the theory on which the bill could be maintained if the plaintiff made a case.

Mr. McENERNEY.—On the other hand, your Honor, the same burden would be on us; the need of the money. [304]

The COURT.—But from what you just said, Mr. McEnerney, I have come to the conclusion that money is the least of your trouble. I thought your great trouble was sugar.

Mr. McENERNEY.—No, your Honor, money is our greatest trouble, because sugar is unsalable at the present moment.

The COURT.—Well, what do you want to do?

Mr. PARTRIDGE.—We would be very glad to have the money paid in to the Clerk of the court; if not that, then we would certainly like to have it so that the order dissolving the temporary restraining order and the entry of the decree be continued at least until to-morrow, so that we can get in tele-

graphic communication with the Chicago people.

Mr. McENERNEY.—We object to that.

The COURT.—Would that embarrass you at all?

Mr. McENERNEY.—We have three days, your Honor, and they are very busy days.

The COURT.—Today is Tuesday. This Court could enter a decree, providing that this present writ of injunction becomes functus officio, to-morrow at 12 o'clock noon; of course the defendant is entitled to a decree, that much cannot be gainsaid. Do you agree at all to the suggestion that the money be deposited with the Court?

Mr. McENERNEY.—No, your Honor, at this point of time we do not wish to make any such arrangement as that.

Mr. LILLICK.—Our bond is good, your Honor.

Mr. McENERNEY.—I don't want the Candy Company. I don't know whether it is in financial distress, or not. It is currently reported that its chief stockholder is, a man who is currently reported to be its chief stockholder.

Mr. LILLICK.—I mean the National Surety | Company. [305]

Mr. PARTRIDGE.—Mr. Lillick is talking about the surety company.

The COURT.—But it is not a question of bonds, it is a question of money, real money.

Mr. LILLICK.—If the money is paid into Court, the Surety Company certainly would be good for the interest, there is no chance of it getting away; the only question is the interest.

Mr. McENERNEY.—We have tried this case, your Honor, we have been awarded a final decree.

The COURT.—Do you feel, Mr. McEnerney, as a man and as a citizen—do you feel that it is impossible to arrive at any understanding whereby the money might be deposited in Court pending a decision of this matter on appeal?

Mr. McENERNEY.—Yes, your Honor.

The COURT.—Well, that is your right.

Mr. PARTRIDGE.—It is equally the right of the Court then to direct in the decree that the injunction be continued in force for a sufficient length of time to enable us to communicate with Chicago, and I will submit to your Honor that that is only fair.

The COURT.—Of course this matter has to move quickly. Sentimental considerations should not be permitted to interfere with a businesslike adjustment of the problem in hand.

Mr. PARTRIDGE.—The thing that is asked for, the main purpose of the bill is to prevent the valuing-under these letters of credit. An appeal would be rendered entirely useless if the money is paid over, and I will submit, if your Honor please, that under the terms of the letters of credit they are good and the banks will pay under them until midnight of the [306] last day of the year, that is Friday, and that no possible harm can come to these gentlemen by a continuance of the restraining order until at least to-morrow.

Mr. McENERNEY.—I would hate to go down to the Bank of California at 10 o'clock on Friday

night to get this money. The whole point is this. if your Honor please; we submit that as your Honor has ordered a final decree that brings the restraining order to an end. They have had it since the 8th of the month. It is now the 28th. They have had it for twenty days; they have had full opportunity to present this matter. Your Honor has ruled that they are not entitled to any rights. ask a final decree be entered in the usual form and that it carry the three provisions I have named: first, that the order of December 8, 1920, be vacated and set aside, which would probably be the effect of the final decree without specific mention; secondly, that we be permitted as we may be advised to move against the National Surety Company; and, third, that the decree operate by virtue of its own force, to reinvest us with the interests transferred to Mr. Maling, and that he be authorized, ordered and directed to give us appropriate and necessary writings to evidence that reinvestment.

The COURT.—Of course two of these are beyond question. Have you any objection to a provision in the decree that the injunctive order shall be discharged as of to-morrow at 12 o'clock?

Mr. McENERNEY.—Well, if your Honor feels that that is appropriate to the occasion, we will submit to it.

The COURT.—I think it is not inappropriate.

Mr. McENERNEY.—We will submit to it.

Mr. PARTRIDGE.—In regard to the provision in the decree respecting the Surety Company, what was your idea about [307] that, Mr. McEnerney,

what kind of an order there should be in the decree?

Mr. McENERNEY.—I want to say something like this: there is hereby reserved to the defendant Sugar Refining Company the right to move against the National Surety Company as it may be advised. That is simply to say in the provision that the decree does not cut us off from that relief.

Mr. PARTRIDGE.—You are entitled to that, but it is absolutely unnecessary.

The COURT.—Perhaps it is, but it dosen't do you any harm.

Mr. PARTRIDGE.—Not at all.

The COURT.—So you don't object to it?

Mr. McENERNEY.—We have made and executed orders to Mr. Maling. We want the decree by virtue of the situation, *ex proprio vigore*, to reinvest us.

The COURT.—That would be proper.

Mr. PARTRIDGE.—Mr. Fox suggests that, inasmuch as he wants to go back to Chicago, that notice of your intended movement in regard to the Surety Company be served before he goes.

Mr. McENERNEY.—I want to see first what damage we have sustained. We must give a ten days' notice. We might not serve you with any notice for some time yet to come, but you would have ten days' notice when we did. We can move in a year if we want to.

The COURT.—Yes, or four years. The statute of limitations is the only limit upon your right. We will take a recess until 3 o'clock.

Thereafter, and at 3 o'clock in the afternoon, the decree was presented to the Court for signature and the same was signed and filed. [308]

# Stipulation of Counsel Settling Evidence Under Equity Rule 75.

It is hereby stipulated by and between the appellant and appellees, that the foregoing constitutes a true and complete statement of the evidence pursuant to said Equity Rule 75, and with the original exhibits mentioned in the foregoing statement, and to be made a part of the transcript of record herein, constitutes all of the evidence introduced in the above-entitled action; and

It is hereby further stipulated that the foregoing statement may be settled, allowed, approved and filed in the above-entitled action and be printed in the transcript to be prepared on appeal in this action.

Dated December 28th, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHARLES LE ROY BROWN,
BROWN, FOX & BLUMBERG,

Attorneys for Appellant.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Appellee, California & Hawaiian Sugar Refining Company.

> H. U. BRANDENSTEIN, Attorney for Canton Bank. [309]

# Order Approving Statement of Evidence Under Equity Rule 75.

Pursuant to the foregoing stipulation, the foregoing transcript is hereby settled, allowed and approved as a true and correct statement of the evidence pursuant to Equity Rule 75.

Dated December 30, 1921.

BLEDSOE,

Judge.

Receipt of a copy of the within statement of evidence is hereby admitted this 4th day of January, 1922.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for C. & H. S. R. Co.
H. U. BRANDENSTEIN,
Attorney for Canton Bank.

[Endorsed]: Filed Jan. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [310]

(Title of Court and Cause.)

## Petition for Appeal.

To the Honorable Judge of the United States District Court for the Southern Division of the Northern District of California.

The above-named James B. A. Fosburgh, trustee of the estate of Continental Candy Corporation, a corporation, a bankrupt, plaintiff, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 28th day of December,

1920, does hereby appeal from said decree to the Circuit Court of Appeals for the 9th Circuit, for the reasons set forth in the assignment of errors herewith filed and it prays that its appeal be allowed and that citations be issued as provided by law and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHARLES LE ROY BROWN,
BROWN, FOX & BLUMBERG,
Solicitors and Attorneys for Plaintiff.

Receipt of a copy of the within petition for appeal is hereby admitted this 25th day of June, 1921.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for California and Hawaiian Sugar Refining Company.

CUSHING & CUSHING,

Attorneys for The First National Bank of San Francisco.

H. U. BRANDENSTEIN,
Attorney for Canton Bank.

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[Endorsed]: Filed June 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [311]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

## IN EQUITY—No. 579.

JAMES B. A. FOSBURGH, Trustee of the Estate of CONTINENTAL CANDY CORPORA-TION, a Corporation, a Bankrupt, Plaintiff and Appellant.

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING COMPANY, a Corporation, THE FIRST NATIONAL BANK OF SAN FRAN-CISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation.

Respondents and Appellees.

## Assignment of Errors.

Comes now the plaintiff, James Fosburgh, trustee in bankruptcy of Continental Candy Corporation, a corporation, in the above-entitled cause, and files the following Assignment of Errors, upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 28th day of December, 1920.

That the United States District Court for the Northern District of California, Second Division, erred in rendering its opinion and making its order and decree [312] dismissing plaintiff's bill of complaint in this case, and that defendants have and recover their costs to be taxed.

2.

That the said Court erred in deciding and decreeing that the plaintiff was not entitled to any form of equitable relief under the allegations and prayer of the plaintiff's bill of complaint.

3.

That the said Court erred in making its decree dismissing plaintiff's bill of complaint, and in determining that the facts proved and established on the trial did not warrant the Court in granting any form of equitable relief to the plaintiff, and ordering that defendants have and recover their costs to be taxed.

4.

That the Court erred in deciding and determining that the facts proved and established on the trial did not make out a *prima facie* case in favor of plaintiff, and entitling it to the relief prayed for in its bill of complaint.

5.

That the said Court erred in deciding and determining that the order of temporary injunction dated, made and filed herein on December 8, 1920, should, at twelve o'clock noon of Wednesday, December 29, 1920, stand vacated and set aside.

That the said Court erred in deciding and determining that the order of temporary injunction dated, made and filed herein on December 8, 1920, should stand vacated and set aside. [313]

7.

That the said Court erred in deciding and determining that leave should be reserved to the defendants to proceed herein against the National Surety Company upon its undertaking filed herein upon December 8, 1920, as said defendants might be advised.

8.

That the said Court erred in deciding and determining that its decree made, entered and filed herein upon the 28th day of December, 1920, should operate as an assignment by Walter B. Maling to the defendant California and Hawaiian Sugar Refining Company of all rights and interests transferred by it to said Walter B. Maling, individually, or to said Walter B. Maling, Special Master, or to said Walter B. Maling, Special Master, for the purposes specified in the order of temporary injunction dated, made and filed herein on December 8, 1920, by three certain instruments dated December 22, 1920, by each of which said California and Hawaiian Sugar Refining Company directed the payment to said Walter B. Maling in any one of the three capacities aforesaid, of a draft drawn by it (there being three drafts in all) against the letters of credit mentioned in the said order of injunction and the bill of complaint herein.

That the said Court erred in deciding and determining that its decree made, entered and filed herein upon the 28th day of December, 1920, should have the effect of an assignment by Walter B. Maling to the defendant California and Hawaiian Sugar Refining Company of all rights and interests transferred by it to said Walter B. Maling, individually, or to [314] said Walter B. Maling, Special Master, or to said Walter B. Maling, Special Master, for the purposes specified in the order of temporary injunction dated, made and filed herein on December 8, 1920, by three certain instruments dated December 22, 1920, by each of which, said California and Hawaiian Sugar Refining Company directed the payment to said Walter B. Maling in any one of the three capacities aforesaid, of a draft drawn by it (there being three drafts in all) against the letters of credit mentioned in the said order of injunction, and in the bill of complaint herein.

10.

That the said Court erred in deciding and determining that the said Walter B. Maling, individually, and Walter B. Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the said order of temporary injunction, dated December 8, 1920, be empowered and directed, if and when requested so to do by the California and Hawaiian Sugar Refining Company, to execute any instruments necessary or appropriate, or believed by the California and Hawaiian Sugar Refining Company to be necessary or ap-

propriate, to evidence, or effect, the retransfer to it of the rights and interests transferred by it to said Walter B. Maling, individually, and in his several capacities above mentioned by the instruments of December 22, 1920, referred to above.

11.

That the said Court erred in empowering and directing Walter B. Maling, individually, and Walter B. Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the said order of temporary injunction, dated December 8, 1920, if, and when, requested so to do, by [315] the California and Hawaiian Sugar Refining Company, to execute any instruments necessarv or appropriate, or believed by the California and Hawaiian Sugar Refining Company to be necessary or appropriate, to evidence or effect the retransfer to it of the rights and interests transferred by it to said Walter B. Maling, individually, and in his several capacities above mentioned, by the instruments of December 22, 1920, above referred to.

12.

That the Court erred in deciding and determining that the defendant California and Hawaiian Sugar Refining Company, and all other persons acting with it, should not be enjoined from delivering to plaintiff, or offering to deliver to plaintiff, the sugar, or any part thereof, referred to in the contracts annexed to the bill of complaint on file herein.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar Refining Company and all other persons acting with it, from delivering to plaintiff, or offering to deliver to plaintiff, the sugar, or any part thereof, referred to in the contracts annexed to the bill of complaint on file herein.

#### 14.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from valuing or drawing under the letters of credit mentioned in the bill of complaint herein.

#### 15.

That the Court erred in refusing to enjoin the [316] defendant California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from negotiating or assigning any drafts drawn under the letters of credit mentioned in the bill of complaint herein.

### 16.

That the Court erred in refusing to enjoin the defendant, California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from taking or receiving payment under the letters of credit, or any of them, mentioned in the bill of complaint herein, from the defendant The First National Bank of San Francisco, California,

of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

#### 17.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from taking or receiving payment under the letters of credit, or any of them, mentioned in the bill of complaint herein, from the defendant Canton Bank, of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

#### 18.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar and Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from taking or receiving payment under [317] the letters of credit, or any of them, mentioned in the bill of complaint herein, from the First National Bank of Chicago, of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

### 19.

That the Court erred in refusing to enjoin the defendant, California and Hawaiian Sugar Refining Company, its officers, servants, members and

agents, and all other persons acting with or for it, from taking or receiving payment under the letters of credit, or any of them, mentioned in the bill of complaint herein, from the Great Lakes Trust Company, of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

20.

That the Court erred in refusing to enjoin the defendant, The First National Bank of San Francisco, California, its officers, servants, agents and members, and all other persons acting with or for it, or aiding or assisting them, or any of them, from paying the defendant California and Hawaiian Sugar Refining Company the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein, under the letters of credit, or either of them, referred to in said bill of complaint.

21.

That the Court erred in refusing to enjoin the defendant, Canton Bank, its officers, servants, agents and members, and all other persons acting with or for it or aiding [318] or assisting them, or either of them, from paying the defendant California and Hawaiian Sugar Refining Company the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein, under

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the letters of credit, or either of them, mentioned in said bill of complaint.

22.

That the Court erred in deciding and determining that the contract of sale of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, was not illegal, null and void.

23.

That the Court erred in deciding and determining that the contract of sale of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, was not illegal, null and void.

24.

That the Court erred in deciding and determining that the contract of sale of May 14, 1920, between the plaintiff and defendant California and Hawaiian Sugar Refining Company should not be cancelled and rescinded.

25.

That the Court erred in refusing to cancel and rescind the contract of sale of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company.

26.

That the Court erred in deciding and determining that the contract of sale of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company [319] should not be cancelled and rescinded.

That the Court erred in refusing to cancel and rescind the contract of sale of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company.

28.

That the Court erred in deciding and determining that the clause in said contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not a condition in said contract in unreasonable and unlawful restraint of trade, and the contract, therefore, illegal, null and void.

29.

That the Court erred in deciding and determining that the clause in said contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not a condition in said contract in unreasonable and unlawful restraint of trade, and the contract, therefore, illegal, null and void.

30.

That the Court erred in deciding and determining that the clause in the contract, under date of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, providing that the sale of said sugar to [320] plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of therein as the "delivery date" of such sugar until the end of the year 1920, did not constitute the said contract one in unreasonable and unlawful restraint of trade, and, therefore, illegal, null and void.

31.

That the Court erred in deciding and determining that the clause in the contract, under date of May 18, 1920, between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, providing that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of therein as the "delivery date" of such sugar until the end of the year 1920, did not constitute the said contract one in unreasonable and unlawful restraint of trade, and, therefore, illegal, null and void.

32.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 14, 1920, was not illegal, null and void because of the restriction therein against, and the forbidding therein of, the resale by the plaintiff of the sugar, or any part thereof, mentioned therein.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 18, 1920, was not illegal, null and void because of the restriction [321] therein against, and the forbidding therein of, the resale by the plaintiff of the sugar, or any part thereof, mentioned therein. [322]

34.

That the Court erred in deciding and determining that the contract, under date of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company was not illegal, null and void because of the provision therein forbidding the sale of any more, or other, sugar in addition to the amounts and quantities specified therein by defendant California and Hawaiian Sugar Refining Company to plaintiff prior to the end of the year 1920.

35.

That the Court erred in deciding and determining that the contract, under date of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company was not illegal, null and void because of the provision therein forbidding the sale of any more, or other, sugar in addition to the amounts and quantities specified therein by defendant California and Hawaiian Sugar Refining Company to plaintiff prior to the end of the year 1920.

That the Court erred in deciding and determining that the provision in the contract between the plaintiff and defendant California and Hawaiian Sugar Refining Company, of May 14, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states, or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States. [323]

37.

That the Court erred in deciding and determining that the provision in the contract between plaintiff and defendant California and Hawaiian Sugar Refining Company, of May 18, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not in violation of the antitrust laws of the United States forbidding contracts in restraint of trade among the several states, or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States.

That the Court erred in deciding and determining that the provision in the contract between plaintiff and defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, providing that the sale of the sugars therein mentioned to plaintiff, constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of as the "delivery date" of such sugar until the end of the year 1920, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States.

39.

That the Court erred in deciding and determining that the provision in the contract between plaintiff and defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, providing that the sale of the sugars therein [324] mentioned to plaintiff, constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of as "delivery date" of such sugar until the end of the year 1920, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, and the terms and conditions thereof, were not in such unreasonable and unlawful restraint of trade as to be at variance with, and contrary to, public policy and interest, and unreasonable and detrimental to the plaintiff and to the interest and policy of the public at large, and in unqualified restriction of trade in a necessary commodity dealt with in trade and commerce among the several states, and, for those reasons illegal, null and void.

41.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, and the terms and conditions thereof, were not in such unreasonable and unlawful restraint of trade as to be at variance with, and contrary to, public policy and interest, and unreasonable and detrimental to the plaintiff and to the interest and policy of the public at large, and in unqualified restriction of trade in a necessary commodity with in trade and commerce among the several states, and, for those reasons illegal, null and void. [325]

42.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Ha-

waiian Sugar Refining Company, under date of May 14, 1920, in so far as they provided that the sugars covered by said contract should only be used by plaintiff for its own manufacturing needs, and under no circumstances was plaintiff to resell the said sugar, or any part thereof, were not illegal, null and void because they effected a withholding and removing of a necessary commodity from the public market and from the public use, and because they restricted the freedom of trade for the benefit of the public, and the public interest, and created a tendency to the maintenance of high prices of and for such necessary commodity, and a monopolistic inflation and raising of price of and for sugar.

43.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, in so far as they provided that the sugars covered by said contract should only be used by plaintiff for its own manufacturing needs, and under no circumstances was plaintiff to resell the said sugar, or any part thereof, were not illegal, null and void because they effected a withholding and removing of a necessary commodity from the public market and from the public use, and because they restricted the freedom of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for such necessary commodity, and a California etc. Sugar Refining Co. et al. 385,

monopolistic inflation and raising of prices of and for sugar. [326]

44.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, providing that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of therein as the "delivery date" of such sugar, until the end of the year 1920, were not illegal, null and void, and effected a withholding and removing of said necessary commodity from the public market and from the public use and restricted the freedom of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for sugar, and a monopolistic inflation and raising of prices of and for the same.

45.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, providing that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of therein as the "delivery date" of such sugar, until the end of the year 1920, were not illegal, null and void, and effected a withholding and removing of said necessary commodity from the public market and from the public use and restricted the freedom

of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for sugar, and a monopolistic inflation and raising of prices of and for the same.

46.

That the Court erred in deciding and determining that the [327] contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 14, 1920, is not entirely and wholly illegal, null and void because of the provision constituting an integral part of said contract, providing that all disputes and controversies thereunder should be finally settled by a prescribed arbitration, extra legal in character, the effect of which provision was and is to oust the courts of jurisdiction, and in deciding and determining that said provision was not contrary and inimical to the public interest and welfare, and the whole contract, therefore, null and void.

47.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 18, 1920, is not entirely and wholly illegal, null and void because of the provision constituting an integral part of said contract, providing that all disputes and controversies thereunder should be finally settled by a prescribed arbitration, extra legal in character, the effect of which provision was and is to oust the courts of jurisdiction, and in deciding and determining that said provision was not contrary and

California etc. Sugar Refining Co. et al. 387

inimical to the public interest and welfare, and the whole contract, therefore, null and void.

48.

That the Court erred in deciding and determining that the contract under date of May 14, 1920, between the plaintiff and the defendant California & Hawaiian Sugar Refining Company, was not nudum pactum, unenforceable, and null and void because it was unilateral and without mutuality and in that it gave the said defendant the privilege of cancelling the said contract if strikes, wars, revolutions, accidents, dangers of the seas, or other unforseen [328] events beyond control, prevented shipment or delayed delivery of the sugar.

49.

That the Court erred in deciding and determining that the contract under date of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company was not nudum pactum, unenforceable, and null and void because it was unilateral and without mutuality, in that it gave the said defendant the privilege of cancelling the said contract if strikes, wars, revolutions, accidents, dangers of the seas, or other unforseen events beyond control, prevented shipment or delayed delivery of the sugar.

50.

That the Court erred in deciding and determining that the notice by the plaintiff to the defendant California and Hawaiian Sugar Refining Company, of the termination and cancellation of the contract dated May 14, 1920, was not valid and did not thereby relieve the plaintiff from any further obligation thereunder.

51.

That the Court erred in deciding and determining that the notice by the plaintiff to the defendant California and Hawaiian Sugar Refining Company, of the termination and cancellation of the contract dated May 18, 1920, was not valid and did not thereby relieve the plaintiff from any further obligation thereunder. [329]

52.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company dated, respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void because they were in violation of the Sherman Anti-Trust Act.

53.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part

thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Wilson Tariff Bill.

54.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar or any part thereof, were not integral [330] parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Clayton Act.

55.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Lever Act, and the amendment thereto, dated December 31, 1919.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated respectively May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Cartwright Act.

57.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, [331] respectively, May 14, 1920, and May 18, 1920, providing that the plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Sherman Anti-Trust Act.

58.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale

of the sugar therein mentioned to plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugar until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void because they were in violation of the Sherman Anti-Trust Act.

59.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, [332] and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Wilson, Tariff Bill.

60.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff

constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Clayton Act.

61.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff constituted plaintiff's quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Lever Act, and the amendment thereto dated December 31. 1919. [333]

62.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff con-

stituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Cartwright Act.

## 63. (Exception No. 1.)

The Court erred in overruling plaintiff's objection to the following question asked the witness, Andrew A. Brown by Mr. McErnerney in cross-examination:

"Q. Was that the only motive of your company in requiring the buyer to agree that it was for his own consumption, and not for the purpose of resale?"

and in permitting the witness to answer:

"A. As far as I know, it was merely trying to follow out the rules of the Department of Justice."

### 64. (Exception No. 2.)

The Court erred in overruling the objection of plaintiff to the introduction in evidence by the defendant of a certified copy of a letter by Howard Figg, Esquire, Special Assistant to the Attorney General, written to the American Sugar Refining Company, April 29, 1920, which is set out in the Answer of the California and Hawaiian Sugar Refining Company, and which [334] referred to a certain Rule 6 of the Food Administration, in which the

Rule 6 of the Food Administration, in which the said Special Assistant stated he would insist upon a strict enforcement of Rule 6, and in permitting the defendant to introduce said letter in evidence.

## 65. (Exception No. 3.)

The Court erred in sustaining the objection of defendant California and Hawaiian Sugar Refining Company to the following question, asked the witness Andrew A. Brown, on redirect examination by Mr. Partridge:

"Q. Under what kind of an arrangement does the California and Hawaiian Sugar Refining Company refine the raw sugar produced by these plantations?" [335]

WHEREFORE, the appellant prays that said decree be reversed and that said District Court for the Northern District of California, Second Division, be ordered to enter a decree reversing the decision of the lower court in said cause and entering therein such decree as will afford the appellant adequate relief and take such further proceedings herein as are according to the principles of law and equity.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LeROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Appellant.

Receipt of a copy of the within Assignment of Error is hereby admitted this 25th day of June, 1921.

# DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Appellee, California and Hawaiian Sugar Refining Company.

CUSHING & CUSHING,

Attorney for Appellee, The First National Bank of San Francisco, California.

H. U. BRANDENSTEIN, Attorney for Appellee, The Canton Bank.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [336]

(Title of Court and Cause.)

## Order Allowing Appeal.

On motion of Messrs, John S. Partridge, Ira S. Lillick and Charles LeRoy Brown, solicitors and attorneys for plaintiff, it is hereby—

ORDERED that an appeal to the Circuit Court of Appeals for the 9th Circuit from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the 9th Circuit.

It is further ORDERED that the bond on appeal be fixed at the sum of five hundred dollars (\$500).

Dated June 27th, 1921.

FRANK S. DIETRICH, District Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [337]

(Title of Court and Cause.)

## Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That James B. A. FOSBURGH, Trustee of the Estate of Continental Candy Corporation, a corporation, as principal, and Globe Indemnity Company, a surety, are held and firmly bound unto the defendants in the sum of Five Hundred (\$500) Dollars, lawful money of the United States, to be paid to them and to their successors and assigns, which payment, well and truly to be made, we bind ourselves and each of us jointly and severally and each of our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 27th day of June, 1921.

WHEREAS the above-named James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree of the District Court of the United States for the Northern District of California in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, shall prosecute his said appeal to effect and answer all costs if he fails to make good his plea and appeal, then this obligation to be void, otherwise to remain in full force and effect.

JAMES B. A. FOSBURGH,

Trustee of the Estate of Continental Candy Corporation, a Corporation, a Bankrupt,

(Seal)

By IRA S. LILLICK,

Its Attorney.

GLOBE INDEMNITY COMPANY. (Seal)
By H. M. PARSONS, Surety,

Attorney in Fact. [338]

State of California,

City and County of San Francisco,—ss.

On this 27th day of June, in the year one thousand nine hundred and twenty-one, before me, John McCallan, a notary public in and for the City and County of San Francisco, personally appeared H. M. Parsons, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Globe Indemnity Company, and acknowledged to me that he subscribed the name of Globe Indemnity Company thereto as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in

the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 12, 1925.

Approved this 27th day of June, 1921.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [339]

(Title of Court and Cause.)

# Plaintiff's Amended Praecipe for Transcript on Appeal.

To Walter B. Maling, Clerk of the District Court Above Named:

You will please prepare the record for the transcript to be printed in the above-entitled action on appeal to the Circuit Court of Appeals for the Ninth Circuit, and incorporate in the transcript of record the following papers:

- 1. Bill of complaint.
- 2. Process.
- 3. Marshal's return.
- 4. Motion of California & Hawaiian Sugar Refining Company to dismiss bill of complaint.
- 5. Answer of First National Bank of San Francisco.
- 6. Answer of California and Hawaiian Sugar Refining Company.

- 7. Oath of office of special master.
- 8. Opinion of District Judge upon final hearing.
- 9. Final decree.
- 10. Marshal's return of service of copy of final decree.
- 11. Stipulation and order substituting John Fosburgh as plaintiff in place and stead of Continental Candy Corporation.
- 12. Petition for appeal.
- 13. Order allowing appeal.
- 14. Assignment of errors.
- 15. Citation on appeal.
- 16. Bond on appeal and approval.
- 17. Statement of evidence under Equity Rule 75.
- 18. All stipulations and orders made and filed on or subsequent to June 27th, 1921, relative to settlement of statement of evidence under Equity Rule 75 and any stipulations and orders [340] relative to preparation of record.
- 19. Stipulation of counsel supplying evidence under Equity Rule 75.
- 20. Order approving statement of evidence under Equity Rule 75.
- 21. Clerk's certificate to transcript.
- 22. Order sending up original exhibits.

Yours respectfully,
JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LeROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.

Received copy of plaintiff's within praccipe for transcript on appeal this —— day of August, 1922.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for California and Hawaiian Sugar Refining Co.

H. U. BRANDENSTEIN, Attorney for Canton Bank.

[Endorsed]: Filed Aug. 28, 1922. Walter B. Maling, Clerk. [341]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 579.

JAMES B. A. FOSBURGH, Trustee of the Estate of CONTINENTAL CANDY CORPORA-TION, a Corporation, a Bankrupt,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING COMPANY, a Corporation, et al., Defendants.

Stipulation and Order Concerning Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED between the attorneys for the respective parties hereunto that the originals of all the exhibits, copies of which are set forth in the Statement of Evidence on appeal in the above-entitled cause, may be lodged with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for such use as may be provided by law.

Dated: August 29th, 1922.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LeROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff.
DONALD Y CAMPBELL

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Defendant California and Hawaiian Sugar Refining Co.

It is so ordered.

HUNT, District Judge.

[Endorsed]: Filed Aug. 29, 1922. Walter B. Maling, Clerk. [342]

(Title of Court and Cause.)

# Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred forty-two (342) pages, numbered from 1 to 342, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on appeal, as the same

remains on file and of record in this office, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$152.00; that said amount was paid the plaintiff and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of August, A. D. 1922.

[Seal] WALTER B. MALING, Clerk United States District Court for the Northern District of California. [343]

### Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States to California and Hawaiian Sugar Refining Company, a Corporation, The First National Bank of San Francisco, California, a Corporation, and Canton Bank, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein

James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, designated to hold and holding the United States District Court for the Northern District of California, this 27th day of June, A. D. 1921.

### FRANK S. DIETRICH,

United States District Judge. [344] Received copy of the within citation this 27th day of June, 1921.

DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for California and Hawaiian Sugar Refining Co.

CUSHING & CUSHING,
Attorneys for First National Bank of S. F.
H. U. BRANDENSTEIN,
Attorney for Canton Bank.

[Endorsed]: No. 579. United States District Court for the Northern District of California. James B. A. Fosburgh, Trustee, Continental Candy Corporation, etc., Appellant, vs. California and Hawaiian Sugar Refining Co. et al., Appellees. Citation on Appeal. Filed Jun. 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3921. United States Circuit Court of Appeals for the Ninth Circuit. James B. A. Fosburgh, as Trustee of the Estate of Continental Candy Corporation, a Corporation, Bankrupt, Appellant, vs. California and Hawaiian Sugar Refining Company, a Corporation, The First National Bank of San Francisco, California, a Corporation, and Canton Bank, a Corporation, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 1, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk. JAMES B. A. FOSBURGH, Trustee of the Estate of CONTINENTAL CANDY CORPORA-TION, a Corporation, a Bankrupt,

Plaintiff and Appellant,

VS.

CALIFORNIA AND HAWAIIAN SUGAR RE-FINING COMPANY, a Corporation, et al., Defendants and Appellees.

Stipulation and Order Extending Time to and Including September 15, 1922, to File Record and Docket Cause.

It is hereby stipulated and agreed by and between the respective parties hereto that the appellant above named may have to and including the 15th day of September, 1922, within which to file his transcript of record on appeal in the above-entitled action.

Dated: August 30, 1922.

JOHN S. PARTRIDGE, IRA S. LILLICK,

Attorneys for Appellant. DONALD Y. CAMPBELL, GARRET W. McENERNEY,

Attorneys for Appellee California and Hawaiian Sugar Refining Co.

H. U. BRANDENSTEIN, Attorney for the Canton Bank. By the Court: It is so ordered.

Dated: Aug. 30, 1922.

WM. W. MORROW, Circuit Judge.

[Endorsed]: 3921. In the United States Circuit Court of Appeals for the Ninth Circuit. James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a Bankrupt, Plaintiff and Appellant, vs. California and Hawaiian Sugar Refining Company, a Corporation et al., Defendants and Appellees. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Sept. 15, 1922, to File Record and Docket Cause. Filed Aug. 30, 1922. F. D. Monckton, Clerk. Refiled Sep. 1, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

James B. A. Fosburgh, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

VS.

California and Hawaiian Sugar Refining Company (a corporation), The First National Bank of San Francisco, California (a corporation), and Canton Bank (a corporation),

Appellees.

### BRIEF FOR APPELLANT.

John S. Partridge, Ira S. Lillick, Charles Leroy Brown, Attorneys for Appellant.

THE LIMIT



IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

James B. A. Fosburgh, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

VS.

California and Hawaiian Sugar Refining Company (a corporation), The First National Bank of San Francisco, California (a corporation), and Canton Bank (a corporation),

Appellees.

### BRIEF FOR APPELLANT.

### Statement of Facts.

This action was originally brought by the Continental Candy Co. (see 270 Fed. 302). Since that time, the plaintiff has been adjudged a bankrupt, a trustee appointed, and that trustee substituted as plaintiff. In May, 1920, the Candy Company entered into two contracts with the defendant, for the purchase of 1250 tons of "Java White" sugar, for shipment from Java in September and October.

Payment was provided for by the establishment of two irrevocable letters of credit, one on the defendant First National Bank for \$300,000.00, and one on the Canton Bank for \$255,800.00, both expiring December 31, 1920; both of the contracts contained the following provision:

"Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."

About the first of December, the sugar arrived in this port. The Candy Company thereupon filed its bill, alleging, among other things, that the clause quoted above was void as being in restraint of trade under the anti-trust laws, and praying that valuation under and collection of the letters of credit be enjoined. Upon filing of the bill, Judge Rudkin issued, after hearing, a preliminary injunction in accordance with the prayer. The defendant in its answer alleged that the prohibition against a resale of the sugar was inserted in the contracts at the request and by the direction of the Bureau of Investigation of the Department of Justice and the Fair Trade Commission. It also alleged that it was a licensee under the Act of August 10, 1917, entitled, "An Act to provide further for the National Security and Defense by encouraging the production, conserving and supply, and controlling the distribution of Food Products and Fuel." That Mr. Hoover was appointed Food Administrator under this Act, and that the defendant, as a condition to securing its license, was obliged to conform to the rules, of which Rule 6 reads as follows:

"Resales Within Same Trade Prohibited, When.—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade, without unreasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice."

It is then alleged that the powers of Mr. Hoover were by proclamation of the President (dated November 21, 1919) transferred to the Attorney General.

Upon the trial, it appeared that the main business of the defendant is refining Hawaiian sugar. The sugar in question, however, was part of a purchase of 10,000 tons of Java sugar, imported by the defendant. The evidence shows that this sugar was imported for direct sale, and not for refining. (Transcript, page 159.) It was sold, however, only to manufacturers of candy, bakers, and canners, and not to grocers or others for household use. It appeared that to use up the shipment, some fifty contracts were made, and they all contained this clause prohibiting a resale. By far the larger part of defendant's business, however, was in selling its own refined sugar; and in contracts for its own product, no such prohibition was exacted.

It appeared that an investigator for the District Attornev, Mr. Montgomery, and the Chairman of the local Fair Trade Commission, Mr. Miller, were the persons who told defendant to put in the clause that it was not for resale. On this point, the evidence of Mr. Brown, Sales Manager for defendant, was as follows:

"Clause 6 was put into the contract on the verbal say-so of Mr. Montgomery, and also the Fair Trade Commission, who were working in conjunction with Mr. Montgomery's superior, Mrs. Annette Adams. The Fair Trade Commission was formed under the Department of Justice. H. Clay Miller was the chairman.

"Q. Did he come down and tell you that in all the Java sugars you must put in the clause that it should not be resold under any circumstances?

"A. He told me that they passed on the Mr. Montgomery came to the office and told me distinctly that, as I remember: whether Mr. Miller told me over the phone or in person, I don't remember, but he did so tell me. Mr. Montgomery and Mr. Miller told me that I must put in a clause that it was not for resale. Mr. Montgomery told us that Mrs. Annette Adams wished us to sell this sugar to manufacturers only, and that they had to use it in their own manufacturing, and not to resell for profit; it could not be passed on; that we had to put that in our contract. Furthermore, in supplying them with this amount of sugar, they could not call on us for any further refined sugar." (Transcript, pages 168, 169.)

Mr. Montgomery testified that he received his instructions from Mrs. Adams, then District Attorney in San Francisco. These instructions were that this Java sugar could be sold only to manufacturers, and that it was not to be resold. (Transcript, page 253.)

As to this, the evidence of Mrs. Adams is as follows:

"We were endeavoring, as a part of our work in reducing the high cost of living and enforcing the Lever Act, to bring about the same equitable distribution of sugar that had been had under the Food Administration and the Sugar Equalization Board. There was no legal provision that the sugar should be so distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the business which they had transacted with them theretofore. In other words, each wholesaler, when a particular lot of sugar was ready for distribution, was to have his proportionate share of that sugar. And we were endeavoring to prevent any wholesaler or any retailer or any manufacturer from hoarding sugar; that is, from obtaining a portion or contracting for a greater supply of sugar than he needed for his immediate needs, for his reasonable use, for a reasonable time, which is the language of the Act." (Transcript, page 257.)

The reasons are further made plain by Mr. Montgomery as follows:

"I did not tell the California & Hawaiian Sugar Refining Company to insert the provision against resale in any of their contracts for other sugars except this particular 10,000 tons. Mrs. Adams did not show any written order from the Attorney General's office in regard to this sugar. I received verbal notification from her.

"The COURT. Was there any reason in your own mind for differentiating between the contract to be followed in the sale of the refined sugar and the contract to be followed in the matter of Java sugar? Was there anything?

"A. No particular thing. The only difference is that with the domestic refined we were

aware at all times of their margins, it was being allocated, and, we were in direct contact with it, whereas with the Java we were not; it was going out of our territory, and we were afraid of resale. By going out of our territory I mean that it was going to Chicago." (Transcript, page 277.)

Mr. Weatherly, who was in charge of the Fair Price Commissions for the Department of Justice (under Mr. Figg, Special Assistant to the Attorney General), testified:

"Q. I call your attention to a clause in the contract dated May 18, 1920, between the California & Hawaiian Sugar Refining Company and the Continental Candy Company of Chicago, the clause dealing with it being as follows:

'Clause 6. Buyer agrees to use the sugar only for his own manufacturing needs, and under no circumstances to resell the same.''

Did the Department of Justice at Washington, either through you or through anyone else connected with the Department of Justice, insist or even authorize, or insist upon or cause to be authorized or insisted upon, the issuance of such a clause in the contract for the sale of sugar in California? A. No.

Q. At any time? A. Never at any time.

Q. I am going to call your attention to this

clause 7, of the sale contract:

'Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Company from delivery date of these Java Whites until the end of the year.'

Did the Department of Justice, on May 20, or on a subsequent date, did the Department of Justice authorize, insist upon, or purport to

authorize or insist upon the insertion in the contract for the sale of sugar in San Francisco? A. No.

Q. Or anywhere else?

A. No." (Transcript, pages 328, 329.)

### And again:

"Assuming that the Fair Price Committee of San Francisco, California, in May, 1920, would have requested permission or authority from the Attorney General's office for the insertion of either of these clauses in the contract for the sale of sugar, our department would not have authorized the insertion of these clauses in any contract for the sale of sugar, the reason that so far as any control was exercised, it was exercised over the distribution of sugar. It is mostly in the licenses and regulations, and such a clause as that—I am referring to the first clause read, the first clause in the contract, 'Buyer agrees to use this sugar only for his needs and under no circumstances will he sell the same', I would refer to the committee that particular clause since it does not or is not used in connection with resales within the trade. It would directly conflict with the purpose of the Governmental control in that it would tend to interfere with the possible movement of the sugar to the consumer. In other words, should the purchaser under that contract, and referring to that specific clause cited, finding himself with more sugar than his manufacturing purposes required, and sought to dispose of it to the consumer, he would be, if that clause were in the contract, I think he would be prevented from doing that very thing he intended should be done, and such a clause would be very much out of the public interest." (Transcript, page 330.)

Upon this evidence the Court directed the entry of a decree for the defendant, upon the sole ground that, admitting the resale clause as within the prohibition of the Sherman Act, still it was, under the circumstances within the "rule of reason" as announced in the Standard Oil case.

### I.

# THE CLAUSE OF THE CONTRACTS PROHIBITING A RESALE IS VOID AS BEING IN RESTRAINT OF TRADE.

It may be worth while, at the outset, to quote the first section of the Sherman Act. It reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. (26 Stat. 209.)"

The other provisions of the Sherman Act are familiar and manifest the intention of Congress to protect the public and all members thereof against such illegal contracts.

One of the important anti-trust laws of the United States originally appeared as Section 73 of the Wilson Tariff Act of 1894. It has since been

amended by Congress and is declared by the Clayton Act of 1914 to be, as amended, one of the anti-trust laws of the United States. Section 73 of the Act of 1894 as amended, expressly applied the rule of the first section of the Sherman Act to any contract between two or more persons or corporations either of whom as principal or agent is engaged in importing any article from any foreign country into the United States, when such contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article imported, or intended to be imported. into the United States, or of any manufacture into which such imported article enters, or is intended to enter. (U. S. Comp. Stat., Sec. 8831.)

And Section 16 of the Clayton Act of 1914 settles the dispute which theretofore existed in the Federal Courts as to the right of remedy by injunctive relief against threatened loss or damage by a violation of the anti-trust laws. Section 16 of the Clayton Act expressly declares that any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage, by a violation of the anti-trust law, when and under the same conditions and principles as, injunctive relief as against threatened conduct that will cause loss or damage, is granted by Courts of Equity.

Each contract contains the following clauses:

- "6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."
- "7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java White until the end of the year." (Transcript, page 23.)

One of the contracts, that of May 14, 1920, was for 750 tons, 250 tons to be shipped from Java in September, and 500 tons to be shipped from Java in October. The other contract, that of May 18. 1920, was for 500 tons to be shipped from Java during October. How each of two entirely separate contracts was to constitute the buver's quota of precisely the same kind of sugar until the end of the calendar year, it is difficult to understand, but the quota paragraph is chiefly important as throwing a light on the attitude and economic conception of the seller when the resale paragraph is being considered. The language as to the allowance of a quota is the language of monopolistic control. seventh clause was virtually a restriction upon the right of the buyer to purchase any more sugar from the seller during the remainder of the calendar year, and this was itself a restriction upon trade, though, of course, nothing like as drastic as the restriction embodied in the sixth clause of the contracts.

The principal question is whether the resale paragraph is illegal. The general principle, both at common law and under the Sherman Act, is that contracts in unreasonable restraint of trade are illegal and invalid. (13 Corpus Juris, 467-489.) We recognize that a contract is not necessarily invalid because it may operate in some restraint of trade; if it is both reasonable as between the parties themselves and not at variance with the public interest, it may be recognized and enforced by the Courts. The recognition of the "reasonable" requirement, in construing the Sherman Act, was made familiar by the decision of Standard Oil Co. et al. v. United States, 221 U. S. 1.

We claim paragraph 6 of this contract is in unreasonable restraint of trade, and renders the whole contract void.

There is no doubt that this agreement not to resell is in restraint of trade. And the restraint is unreasonable and detrimental both as to the buyer and as to the public.

While the Continental Candy Corporation was itself a larger user of sugar, its factories, all or some of them, might be idle for long periods of time. And at particular times it might have large surplus stocks of manufactured candy greatly in excess of its ability to sell throughout periods of many months beyond a particular date. In the ordinary course of trade it does not follow that stocks of manufactured candy will necessarily conform in volume to abundance or to lack of sugar; this company, or all candy manufacturers, may have a great over-supply of manufactured candy at a period when there is temporarily an acute general

shortage of sugar; and one given manufacturing company may have vast candy stocks at a time when other manufacturers are in sharp need of sugar, or when there is a great general demand of the public for sugar. Furthermore, regardless of the candy market any single manufacturer may at given times be unable to carry on manufacturing operations and to use any or much sugar; such a manufacturer may have to close all or part of his factories on account of fire or other casualty, or on account of persistent strikes, or on account of financial reverses or losses; and it may be true that at such times the general public demand for sugar is extraordinarily pressing. If at any of the times suggested in the foregoing, manufacturers holding millions of pounds of surplus sugar can freely sell that commodity, the tendency is to reduce or keep down its price. Innumerable other instances and occasions why it may be desirable and in the public interest for manufacturers holding large stocks of sugar to be able to sell it, will suggest themselves to any one giving the subject consideration. Manifestly, such a prohibition against resale as is contained in the contracts in question restricts competition, and the general rule has always been that contracts are invalid when they tend to lessen competition. The general prevalent economic view in this country has been and is that restriction of competition tends to raise or keep up prices of commodities, and, of course, such a tendency is deemed detrimental to the public interest.

Most of the cases holding contracts to be in unreasonable restraint of trade are with reference to contracts only in partial or conditional restraint, such as that the commodity shall be resold only at a certain price. Clearly such a provision in a contract is far less restrictive than a provision that the commodity shall not be resold at all. The authorities, therefore, condemn unqualifiedly general restrictions against sale or alienation, except as to particular articles like works of art, heirlooms, or domestic pets, something to which sentiment or the like attaches, and which do not affect the general course of trade. Thus, in the Dr. Miles Medical Co. case, 220 U.S. 373, at page 404, the Court declared that a general restraint upon alienation is ordinarily invalid, and quoted with approval the well-known observations of Lord Coke thereon. And in Straus v. Victor Talking Machine Co., 243 U. S. 490 at page 501, the Supreme Court said that to place restraints upon the further alienation of a commodity has been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest.

The leading price restriction cases, in which the Federal Courts have held invalid, indeed criminal, the making of interstate restrictions upon resale by limiting the price, even as to patented articles, are:

Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373;

Straus v. Victor Talking Machine Co., 243 U. S. 490;

Motion Picture Patents Co. v. Universal Film Mfg. Co. et al., 243 U. S. 502;

Boston Store v. Amer. Graphophone Co., 246 U. S. 8;

U. S. v. A. Schraeder's Son, Inc., 252 U. S. 85.

See also,

Park & Sons Co. v. Hartman, 153 Fed. 24; B. V. D. Co. v. Isaac et al., 257 Fed. 709; 13 Corpus Juris, 483 and cases in notes.

An extensive annotation of cases on resale price control is contained in

7 A. L. R. 449.

Moreover, the clause seems to come directly within the language of the Wilson Act. Section 73 of that Act in part reads:

"Every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which said imported article enters or is intended to enter. \* \* \* " (United States Compiled Statutes, § 8831—Act Aug. 27, 1894, c. 349, § 73 as amended, Act Feb. 12, 1913, c. 40.)

In this case, it is clear that the sugar, by the very terms of the contracts, was imported from Java.

Again, the Lever Act itself provides (Section 4):

"It is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof: knowingly to commit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their production", etc.; "to hoard, as defined in Section Six of this Act, any necessaries; to monopolize, or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries: (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section." (Act August 10, 1917, c. 53, § 4.)

It would be hard to imagine any more effective restriction upon distribution than a covenant that goods were not to be sold at all.

### II.

THE GENERAL RULE IS THAT A VIOLATION OF THE LAW IS NOT EXCUSED BECAUSE THE VIOLATOR HAS OFFICIAL SANCTION FOR HIS ACT.

In

Dodd v. State, 18 Ind. 56,

there was a suit on the official bond of Dodd, Auditor of State, on the ground that he had received certain fees, which he had failed to pay into the State Treasury. One of the matters set up in defense was that the Auditor, in receiving and retaining the fees, was acting under the written opinion of the Attorney General of the State. The Supreme Court held that the official opinion of the Attorney General of the State can constitute no legal justification of any officer, for any act done in pursuance of it, but such act must be tested by the law.

Tn

State v. Sparks, 27 Texas 627,

prisoners were wrested from the sheriff by the defendant Sparks, whose defense was that he was acting under the direction and authority of Major General Magruder. The Court said:

"Nor can an illegal act be justified by an order from superior authority, no matter how high the source from which it emanates."

In

State v. Simmons, 143 N. C. 613; 66 S. E. 701, it was held that the unlawful carrying of a concealed pistol by a game warden is not excused by

the fact that the warden, acting under the advice of the clerk of the Court that, being a constable, he had the right to carry the pistol, carried it under that belief.

In

State v. Foster, 22 R. I. 13; 46 A. 833,

it was held that where the statute makes it a misdemeanor for itinerant vendors to sell merchandise without first obtaining a state and local license, the fact that a merchant having a permanent place of business in a city of the state was advised by the state treasurer that it would not be necessary for him to procure a license to temporarily exhibit his goods for sale in another town of the state, and that the act did not apply to him, did not exempt such merchant from prosecution for a violation of the statute.

In

Head v. Porter, 48 Fed. 481,

it was held that an officer of the United States, in charge of a government armory, may be sued in the Circuit Court for infringement of a patent, notwithstanding that all his acts in relation thereto have been performed under the orders of the government.

It has often been held that a military officer cannot justify his trespass in taking private property by producing the order of his superior.

> Mitchell v. Harmony, 54 U. S. 115; Jones v. Commonwealth, 1 Bush 40; 89 Am. Dec. 609;

Mostyn v. Fabrigas, 1 Cowp. 180;

Hogue v. Penn., 3 Bush 666; 96 Am. Dec. 276;

Ferguson v. Loar, 5 Bush 694;

Yost v. Stout, 4 Cold. 212; 84 Am. Dec. 198; Clark v. Mitchell, 64 Mo. 567;

Stanley v. Schwalby, 85 Tex. 355; 19 S. W. 267;

Hedges v. Price, 2 W. Va. 225; 94 Am. Dec. 511;

Skeen v. Monkeimer, 21 Ind. 4.

The advice of counsel furnishes no excuse to a client for violating the law, and cannot be relied upon as a defense either in a civil action or in a criminal prosecution.

U. S. v. Anthony, 24 Fed. Case. No. 14,459;

Dodd v. State, 18 Ind. 56;

State v. Goodenow, 65 Me. 30;

Smith v. State, 46 Tex. Crim. Rep. 267; 81 S. W. 712;

Jasper v. Purnell, 67 Ill. 361;

Commonwealth v. Middelby, 187 Mass. 342; 73 N. E. 208;

Weston v. Commonwealth, 111 Pa. 251; 2 A 1919;

State v. Hunt, 25 R. I. 69; 54 A 937;

People v. Weed, 29 Hun. 628; 96 N. Y. 625;

Medrano v. State, 32 Tex. Cr. 214; 22 S. W. 684.

In

1 Wharton Criminal Law, page 484,

the rule is thus laid down:

"The fact that an act is done by an officer of the government, or an agent or representative of the government acting under the direction of a superior officer of the government, will not constitute a ground of defense, and exempt the person so acting from personal liability for the wrongful act."

Tn

People v. McLeod, 1 Hill 377; 25 Wend. 483, it was held that the fact that a crime was committed in time of peace under the direction of the local authorities of a foreign government, is no defense.

### III.

IT IS CLEAR, IN ANY EVENT, THAT THE DISTRICT ATTORNEY IN SAN FRANCISCO, HAD NO POWER OR AUTHORITY TO DIRECT MR. MONTGOMERY TO ASK FOR ANY SUCH RESTRICTION.

It seems, from the testimony of Mrs. Adams, that what she was endeavoring to accomplish was to prevent the Middle West from securing sugar to the detriment of the Pacific Coast. Her argument seems to be, that a buyer of this sugar might obtain more than his needs and pass it on to others. How this can be reconciled with the fact that the defendant's own product was permitted free sale, and this restriction confined only to this Java sugar, it is difficult to see. Moreover, it is perfectly clear that Mrs. Adams had no authority whatever from her

superior, the Attorney General,—in whom, if in anyone, was vested this control—to exact any such condition. Moreover, the zoning system had been abolished, by express provision of Act of Congress, before these contracts were made. On the 31st of December, 1919, the Lever Act was amended, and this language added:

"Provided that the provisions of this Act shall expire as to the domestic product June 30, 1920; and provided, further, that the zone system of sale and distribution of sugars here-tofore established by the said United States Sugar Equalization Board shall be abolished, and shall not be re-established or maintained, and that sugars shall be permitted to be sold and to circulate freely in every portion of the United States."

So that, the act of the District Attorney in demanding and the act of the defendant in inserting this clause, if it was for the purpose of protecting the Pacific Coast, was in violation of the statute abolishing the zone system. But the amendment goes much further than that; it provides that sugars shall be permitted to be sold and to circulate freely in every portion of the United States.

Furthermore, the direction of Mrs. Adams and Mr. Montgomery were in direct violation of the rule put out by the Food Administration. That section, known as Section 6, prohibits resales "within the same trade". But this was not a restriction within the same trade. Its terms are absolutely general—it prohibits the Candy Company from selling the sugar anywhere, to anybody, at any time. And this

is likewise in violation of the other language of this section of the regulations, which reads:

"The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as possible, and without unreasonable delay."

The Court below decided the case really upon the ground that the country was, nominally at least, still in a state of war (although hostilities had been at an end for more than a year and a half) and that therefore, the restriction must be considered as a reasonable one. The language is as follows:

"If this contract had been entered into in normal times, and if the defendant Sugar Company had inserted this clause in the contract with the intention on its part to prevent a subsequent sale of this sugar in order that it itself thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar. I would be disposed to give very careful consideration to the argument advanced to the effect that that is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. It is not a time of peace; it is not a time for the normal operation of usual economic laws; it is a time of war, a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known." (Transcript, page 100.)

But the Supreme Court has held time and again that the existence of a state of war does not authorize even Congress to enact an unconstitutional law. The latest expression on this subject is the case in which the Supreme Court declared void Section 4 of the Lever Act. The language is as follows:

"We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. Ex parte Milligan, 4 Wall. 2, 121-127; 18 L. ed. 281, 295-297; Monongahela Nav. Co. v. United States, 148 U.S. 312, 336; 37 L. ed. 463, 471; 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso., 171 U.S. 505, 571; 43 L. ed. 259, 288; 19 Sup. Ct. Rep. 25; McCray v. United States, 195 U.S. 27, 61; 49 L. ed. 78, 97; 24 Sup. Ct. Rep. 769; 1 Ann. Cas. 561; United States v. Cress. 243 U. S. 316, 326; 61 L. ed. 746, 752; 37 Sup. Ct. Rep. 380; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 156; 64 L. ed. 194, 199; 40 Sup. Ct. Rep. 196. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view."

United States v. Cohen Grocery Co., 65 L. Ed. 520, 521.

To uphold the decision of the lower Court, therefore, is to grant to a District Attorney a power beyond that which could be exercised by Congress itself.

### IV.

#### THE ILLEGAL CLAUSE DESTROYS THE WHOLE CONTRACT.

It is apparent from the answer, and the evidence shows without contradiction, that the Sugar Company would not have entered into the contract without this provision. The agreement was prepared in San Francisco, and sent to the Candy Company in Chicago, and the latter was told that the contract must go as written or not at all. The rules are laid down in

Hastings v. Shackles, 202 U. S. 71, as follows:

"The test is, would the contract have been entered into by either of the parties if it were not for the illegal consideration."

### And again:

"Every part of the consideration goes equally to the whole promise, and, therefore, if any part of it is contrary to public policy the whole promise fails."

The evidence shows that at the time the contracts were made, sugar was very high. The principal business of defendant was refining and selling Hawaiian sugar. It was, of course, to its interest that this high price should continue. It was, therefore, equally to its interest that this 1250 tons should be used in the Candy Company's business, and not thrown into the market to compete with their own product. It was, therefore, of advantage to them,

and a great detriment to us. In either event, it was clearly a part of the consideration.

By means of this device which the defendant adopted in this case, they sold this 10,000 tons of Java whites to various canners, manufacturers of syrups, manufacturers of confectionery, wholesale bakeries and the like, gave them the amount, and compelled them, by this clause, to hold it and to hoard it, if need be, and thereby take away that amount of competition from the sale of their own refined product to the householder, the hotel man, the restaurant man, or what-not; and it is a significant fact that while they enforced that clause against resale in every single contract that they made for these Java sugars, there was not a word said in any of the multifarious contracts running to 400,000 tons which they made for the sale of their own sugar.

### V.

THE JURISDICTION OF EQUITY TO ENJOIN THE COLLECTION OF PAPER GIVEN TO SECURE AN ILLEGAL CONTRACT IS CLEAR.

We think on this subject, we need do no more than cite the text writers:

Bispham says:

"In every case where rules of public policy are violated, and where relief could be afforded by the machinery of a court of chancery, and where a full, adequate, and complete remedy could not be had at common-law, equity will

interpose for the purpose of restraining an action brought to enforce such a contract, or to compel the surrender of the instrument by which it has been secured." (Bispham's Equity, Sec. 229.)

### And Pomeroy says:

"Where the agreement is thus void, a court of equity may always exercise its jurisdiction defensively, by defeating a suit brought for the enforcement of the contract; or affirmatively, by granting the remedy of cancellation or of injunction when the defensive remedy at law would not be certain, complete, and adequate."

(2 Pomeroy's Equity, Sec. 934.)

### VI.

THE COURT BELOW SHOULD BE DIRECTED TO ENTER JUDG-MENT AGAINST THE DEFENDANT FOR THE AMOUNT COL-LECTED ON THE LETTERS OF CREDIT, WITH INTEREST.

While there is a general rule that if, pending appeal, events happen which render it impossible, without the fault of the defendant, to give the plaintiff the relief he sought by his suit, the appeal will be dismissed, still it is recognized that where, after the filing of the bill for an injunction without plaintiff obtaining the injunction, the defendant proceeds to do that which is sought to be enjoined, and it is afterwards held on appeal that the plaintiff was entitled to the injunction, the plaintiff will be given as adequate relief as it is possible for the court to give.

The general principle is stated and authorities cited in

Mills v. Green, 159 U. S. 651, 654; Platteville v. Galena & Southern Wisconsin Ry., 43 Wis. 493,

is a good illustration. In that case a municipality obtained a temporary injunction against the location of a railway in violation of a contract with the municipality. On further hearing the injunction was dissolved by the trial Court. The railway was then built in the location which the plaintiff complained of. The dissolution of the injunction was reversed by the Supreme Court of Wisconsin. The Supreme Court, speaking by the distinguished Chief Justice Ryan, at pages 506-7 said:

"The course of the respondent was willful, wrong and gross fraud towards the appellant. and the injunction restraining it should have been continued. But it is said, and indeed conceded, that the road enjoined has been actually built since the dissolution of the injunction. It is therefore urged that the injunction will be ineffectual. It is none the less the duty of this court to reverse the order dissolving it. And it will be thereupon the duty of the court below to exercise its authority, as far as it can, towards repairing the wrong which its error has permitted. 'The consequence may possibly be to stop the railway. I answer that it ought to be stopped, for it passes where it does by wrong. Shadwell, V. C. in Att'y Gen'l v. G. N. Railway Co., 4 De Gex & Sma. 75. construction of the road pending the appeal was a bold and dangerous risk in disregard of judicial authority. The railroad company is the creature of the law, and must be taught, if need be, that the law is stronger than its

creature; and that the construction of a road in violation of the law and its duty does not place it beyond the power of the courts to enforce its good faith and obedience to the law in the performance of its contracts.

By the Court:—The order dissolving the injunction is reversed, and the cause remanded to the court below for further proceedings according to law."

In

Terhune v. Midland Railroad, 36 N. J. Eq. 318,

the Court held that the fact that the act sought to be enjoined may have been accomplished pending appeal, does not take away the right of appeal because the Court may, on such an appeal, hear and adjudge the right upon which a preliminary injunction should have been granted.

In

Tucker v. Howard, 128 Mass. 361,

plaintiff filed a bill for an injunction, but no temporary injunction was granted. After the commencement of the suit the Supreme Court held that the building sought to be enjoined would be in violation of plaintiff's right. But in the meantime defendant had built the wall. The Supreme Court held the plaintiff was entitled to have the wall removed and to a decree for a mandatory injunction and for payment of damages suffered pending the suit.

The general rule also is that on reversal of a judgment or a decree, the law raises an obligation

on the part of the party who received benefits from its enforcement to restore those benefits to the adverse party. (4 Corpus Juris 1235-1239, 1203.)

It is proper for a reviewing Court in an equity cause to direct the rendition of a final judgment by the lower Court. (4 Corpus Juris 1192.) And when the reviewing Court is ordering the entering of judgment it may bear in mind that a Court of equity grants relief according to the status of the parties at the time of the decree. (Randel v. Brown, 2 How. 406.) A reviewing Court may proceed to correct the fundamental error and finally dispose of the case in that manner in which it should have been disposed of in the Court below. (2 R. C. L. 284, Sec. 238 of article ..... on Appeal and Error, and cases cited in Note 18.)

It is the duty of the Court to enter a decree operating upon the parties and subject matter as they stood at the commencement of the suit. (21 Corpus Juris 663.) But the Court will grant relief in the light of the situation existing at the time of the entry of the decree. See, Denver v. Mercantile Trust Co., 201 Fed. 790, 810; and especially McCormick v. Oklahoma City, 203 Fed. 921, and authorities cited on page 925; and Southern Pacific R. R. Co. v. Allen, 5 Cal. Unreported Cases 51; 40 Pac. 752, 754.

Under the prayer for general relief recovery of money judgment may be allowed. A prayer for general relief is as broad as the equitable powers of the Court. (21 Corpus Juris 679.) Such a gen-

eral prayer may serve as a substitute for the prayer for special relief and authorize relief of a different nature when that specially prayed is denied, even to the extent of substituting a money decree in lieu of relief specifically prayed. (21 Corpus Juris 681-2.) Matters accruing pending suit may be adjudicated and disposed of under a general prayer. (Burleigh v. White, 70 Me. 130.)

A direct attack upon a bill by appeal certainly should yield as much relief as proceedings by extraordinary remedies like supplemental proceedings or a bill of review. It has been held that when it is sought to open a decree by a motion or petition, and when the motion or petition is allowed, it is the duty of the Court to render a final decree such as should have been rendered in the first instance. (21 Corpus Juris 720.) And when a bill of review is sustained the Court may proceed to render such decree as should have been rendered in the first instance. (21 Corpus Juris 766.)

We, therefore, respectfully submit that the judgment should be reversed, and the Court below directed to render judgment for \$555,800.00, with interest.

Dated, San Francisco, October 14, 1922.

> John S. Partridge, Ira S. Lillick, Charles Leroy Brown, Attorneys for Appellant.



## No. 3921

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

James B. A. Fosburgh, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

vs.

CALIFORNIA and HAWAIIAN SUGAR REFINING COM-PANY (a corporation), THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA (a corporation), and CANTON BANK [of San Francisco] (a corporation),

Appellees.

Upon Appeal from the Northern District of California. Honorable Benjamin F. Bledsoe, D. J., Presiding.

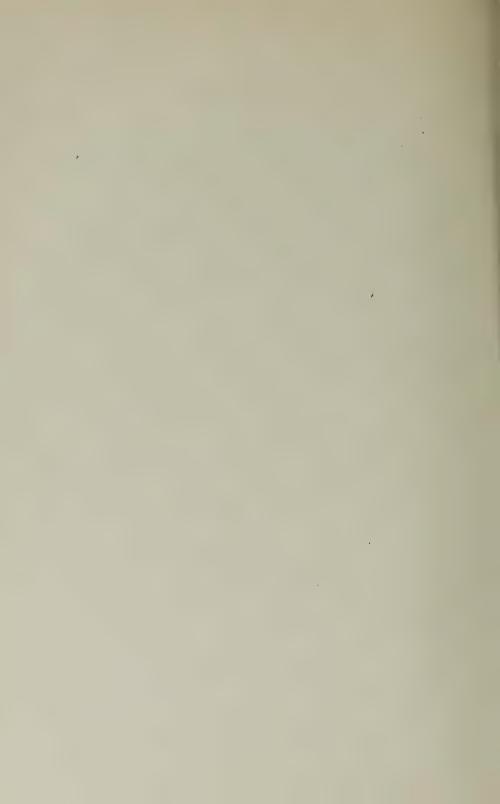
## BRIEF FOR APPELLEE.

(California and Hawaiian Sugar Refining Company.)

Donald Y. Campbell,
Garret W. McEnerney,
Attorneys for Appellee Sugar Company.

FILED

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IN THE

# United States Circuit Court of Appeals

#### For the Ninth Circuit

James B. A. Fosburgh, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

VS.

CALIFORNIA and HAWAHAN SUGAR REFINING COM-PANY (a corporation), THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA (a corporation), and CANTON BANK [of San Francisco] (a corporation),

Appellees.

Upon Appeal from the Northern District of California. Honorable Benjamin F. Bledsoe, D. J., Presiding.

## BRIEF FOR APPELLEE.

(CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY.)

## The Facts.

## (a) The Case in Outline.

This is an appeal from a decree in equity dismissing a bill of complaint upon the merits after final hearing (R. 107; for opinion see 270 Fed. 302, R. 90, 344). Subsequent to the entry of the decree the original complainant became bankrupt (R. 112) and the appeal is prosecuted by its trustee (R. 110).

The suit (brought December 1, 1920) was an attempt by a purchaser of sugar to effectuate its repudiation of a contract of purchase and sale made by two writings dated May 14 and 18, 1920, which were executed and exchanged together (R. 237, 236) and made a single contract.<sup>1</sup>

The concrete purpose of the suit was to enjoin the seller from collecting for the sugar under irrevocable letters of credit issued to it by Chicago banks although under the authorities these letters of credit created contracts between the banks and the seller only, which were independent of and distinct from the contract of purchase and sale between buyer and seller, as will later appear. (The Chicago banks were out of the jurisdiction and not sued; the complainant claimed that they were not necessary parties.)

The suit was one of many brought throughout the country with similar purpose in the fall and early winter of 1920 by persons and concerns who had purchased sugar in the spring of 1920 for future delivery when the world price was high and who had heavy

Section 1642, Cal. Civil Code;
 Flinn v. Mowry, 131 Cal. 481, 484;
 Cobb v. Doggett, 142 Cal. 142, 144.

Although it is our contention that these two writings made but a single contract, the bill of complaint treated the writings as creating two contracts and therefore following the position of the appellant here, we discuss the transactions involved as though the writings were in legal effect two contracts, although we claim that in legal effect they created but a single contract. This question is of no real importance in the case and we note it largely in the interest of clearness.

losses staring them in the face in the fall as the result of a marked drop say, of 60% in price.<sup>2</sup>

The original complainant, Continental Candy Corporation operating in Chicago, Jersey City and New York (hereinafter called the candy company) was the purchaser, and the appellee California and Hawaiian Sugar Refining Company (hereinafter called the sugar company) was the seller. The appellee sugar company is a dealer in sugar, has its office in San Francisco and operates a large refinery at Crockett on San Francisco Bay where it refines raw sugar most of which is cane sugar and comes from Hawaii (R. 154, 205-206).

The candy company was incorporated May 1, 1919, and succeeded to and enlarged the business of an earlier candy company (R. 216, 207). The earlier candy company had been a customer of the sugar company, and the candy company, original complainant here, had been one of the customers of the sugar company in the year 1919 after its incorporation on May 1st (R. 170-171).

<sup>2</sup> El Reno Grocery Co. v. Lamborn & Co. (decision by Justice Cohalan of the Supreme Court of New York, published in the New York Herald of Friday, December 17, 1920, page 22, column 3) was a suit by the grocery company to restrain the importers (Lamborn & Co.) from collecting on letters of credit issued to assure payment on sugar contracts. The petitioners for the injunctions contended that the contracts had been broken because the sugar was shipped in a vessel other than the one specified in the agreement, whereas the defendants asserted that the attempted repudiation of the contracts was due to the fall in the price of sugar.

In his opinion denying an injunction for the reason that the plaintiffs had an adequate remedy at law, Justice Cohalan said:

<sup>&</sup>quot;There are before the court twenty-four motions for injunctions pendente lite in equity cases brought for the cancellation of certain contracts for the sale of sugar which the plaintiffs have attempted to rescind. The decision of this application is decisive of the twenty-three other motions."

In addition to the twenty-four cases mentioned by Mr. Justice Cohalan many others will be found listed in this brief.

Early in 1920 owing to crop reports, etc. forecasting a world shortage and owing to strikes in Hawaii which were reducing its own normal importation of sugar (R. 157-158) the appellee sugar company "bought sugar to aid our customers to have sufficient supplies" (R. 159), i. e., 10,000 (long) tons of Java White sugar to be shipped from Java to San Francisco Bay in August (3000 tons), September (3000 tons) and October (4000 tons) (R. 157-158). The American housewife will not ordinarily use this sugar on her table owing to its grain and appearance and it is rarely imported into the United States; indeed, in America it is only suitable for use in the manufacture of commodities containing sugar (R. 156, 158-159, 154).

Continental Candy Corporation was engaged in the manufacture of candy and confectionery of all descriptions (R. 207) and therefore a large user of sugar. In May, 1920, at one time and by two instruments dated respectively May 14 and 18, 1920, the candy company purchased from the sugar company, one-eighth of the 10,000 tons of Java White sugar already mentioned, i. e., 1250 tons (2240 pounds to the ton) for shipment from Java, 250 tons in September and 1000 tons in October at 19.85 cents per pound f. o. b. San Francisco, or a total of \$555,800. (The market price of refined sugar May 14-18, 1920, was 22.75 cents per pound—R. 157, 162.)

Under the terms of each of the two contracts of purchase and sale the candy company was required to furnish the sugar company with "irrevocable" letters of credit through San Francisco banks for the full amount of the purchase price, and it therefore procured two letters of credit addressed to the sugar company, one by the First National Bank of Chicago for \$300,000 and another by the Great Lakes Trust Company (of Chicago) for the balance of the entire purchase price, or \$255,800. (These Chicago banks made arrangements with San Francisco banks as appears later.)

By the terms of these letters of credit, it was provided that the banks named would against shipping documents, etc. pay drafts drawn by the sugar company if the drafts were drawn, etc. before December 31, 1920.

The contracts of sale and purchase and the letters of credit read as below.

## Contracts of Sale and Purchase dated May 14, 18, 1920.

The first contract was for 750 tons and the second contract for 500 tons to be shipped from Java—250 tons in September and 1000 tons in October. In the parts pertinent to this appeal the contracts were identical (R. 22-24), and as follows:

- "1. The California & Hawaiian Sugar Refining Co., of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Illinois, have to-day bought the following sugars: \* \* \* \* FOB cars San Francisco, California. \* \* \*
- 2. Payment. Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller. \* \* \*
- 6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.''

This brings us to the text of the two Chicago letters of credit.

#### The Two Chicago Banks' Letters of Credit.

"Chicago, Ill., June 1, 1920. (Addressed by Great Lakes Trust Company to appellee sugar company) Our Com'l Credit No. 1073. For account of the Continental Candy Corporation of Chicago we hereby authorize you to draw on this bank at sight up to an amount not exceeding \$255.800.00 \* \* \* to cover Dutch standard 25 refined sugar 99% test, to be shipped from Java during September and/or October, 1920. Your drafts are to be accompanied by plain invoices in triplicate and clean railroad bills of lading to order of shippers and blank endorsed, showing shipment from San Francisco to Chicago—the price to be \$19.85 per 100 lbs. f. o. b. San Francisco. This credit will remain in force until December 31, 1920, and all drafts must be drawn and negotiated on or before that date. We hereby agree with the makers, endorsers and bona fide holders of all drafts drawn under and in compliance with the terms of this credit that such drafts shall meet with due honor on presentation at our bank \* \* \*. Drafts under this credit may be negotiated, if desired, with the Canton Bank of San Francisco." (R. 275-276.)

"Chicago, June 2, 1920, (Addressed by the First National Bank of Chicago to appellee sugar company) No. G. C. A6385. We hereby authorize you to value on The First National Bank of Chicago, at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U.

S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each)—99 test, 25 Dutch Standard at \$19.85 per 100 lbs. FOB San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920. The Bills of Lading must be issued to the order of Shippers and endorsed in blank. The Shipment must be completed and the Bill drawn on or before December 31, 1920, and sent to The First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice. on receipt of which Documents the Bills will be duly honored. \* \* \* We hereby agree with drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago. This credit is confirmed and irrevocable. If desired. drafts under this credit will be paid at the counter of the First National Bank, San Francisco, Calif." (R. 274-275.)

As the contract of purchase and sale between the candy company and the sugar company required "an irrevocable letter of credit through San Francisco bank" it became necessary for the Chicago banks to arrange for the payment of the drafts in San Francisco. Accordingly, on June 3, 1920, the First National Bank of Chicago requested the First National Bank of San Francisco to confirm its letter of credit and to advise the seller that it (the First National Bank of San Francisco) was prepared "to pay" drafts. Seemingly the Great Lakes Trust Company of Chicago requested the Canton Bank of San Francisco merely "to negotiate" drafts against its letter of credit and to

advise the seller that it would do so.<sup>3</sup> These arrangements resulted in letters to the seller from the two San Francisco banks reading as below.

#### Letters of the Two San Francisco Banks.

"San Francisco, June 8, 1920. (Addressed by The First National Bank of San Francisco to appellee sugar company.) We have received from the First National Bank, Chicago, copies of your Letters of Credit, No. G. C. A6385 and \* \* \* for \$300,000 and \* \* respectively, both issued in your favor. These credits are irrevocable and are hereby confirmed, and we stand in readiness to pay your draft drawn under their provisions." (R. 34, 137.)

"San Francisco, August 13, 1920. (Addressed by the Canton Bank to appellee sugar company.) Re: Commercial Credit No. 1073 issued by The Great Lakes Trust Co., Chicago. \* \* \* Assuring you of our pleasure to negotiate your documentary bills drawn in compliance with the terms of this credit, we remain," etc. (R. 319-320.)

After the contracts had been made and the letters of credit issued, conversations occurred between the buyer and the seller looking to modifications of the contracts in minor particulars. These conversations all

<sup>3</sup> It is not important here to consider the difference in liability assumed by the First National Bank of San Francisco "to pay" drafts and that of the Canton Bank of San Francisco "to negotiate" drafts. The former bank intended to confirm the letter of credit of its Chicago correspondent and acted upon that basis throughout the litigation. The Canton Bank withdrew its promise "to negotiate" drafts, thereby assuming that it was open for it to do so. In the events which happened, we need not now concern ourselves with that question, nor with the question whether or not the arrangement of the Great Lakes Trust Company made with the Canton Bank satisfied the requirements of the contract of purchase and sale.

proceeded upon the assumption, of course, that the contracts were valid and in force and would be lived up to by the parties. The conversations dealt with the subjects following:

- (1) About August 13, 1920, there was a suggestion concerning the substitution of granulated sugar for Java White sugar (R. 174, 239, 319);
- (2) A few days prior to August 24, 1920, the contracts were modified so that the words "f. o. b. cars, Crockett, California," were substituted in lieu of "f. o. b. cars San Francisco, California" (R. 7, 37, 47, 240, 320);
- (3) September 2, 1920, there was a suggestion by letter from the candy company to the sugar company that it would be accommodated by having the shipments from Java delayed (R. 174-175, 238-239); and
- (4) October 4, 1920, there was a requirement that the certificate of inspection of a named person should be included in the shipping documents (R. 320-321).

The sugar began to arrive in San Francisco Bay November 23, 1920 (R. 16), and shortly before this date sugar having fallen more than 50% of its May price<sup>4</sup> the candy company consulted its Chicago counsel with a view to the repudiation of its obligation to purchase (R. 243 foot; 162-163).

<sup>4</sup> At the dates of the contracts, May 14. 18, 1920, the price of refined sugar was 22.75 cents per pound (R. 157), whereas on November 23, 1920, it was 9 cents per pound, and continued to fall (R. 162-163). All sugars, including Java White sugar, fell in the same ratio (R. 163).

The first suggestion, however, by the candy company to the sugar company that it proposed to repudiate its contracts occurred November 27, 1920, when a Chicago brokerage house, through which the sugar had been sold to the candy company, telephoned the latter advising it of the arrival of a portion of the sugar in San Francisco. Thereupon the president of the candy company told the brokerage house that the Chicago attorneys for the candy company were in San Francisco about to commence suit to prevent payment upon the letters of credit because clauses 6 and 7 of the contracts of purchase and sale were illegal (R. 244-247). The brokerage house immediately telegraphed this conversation to the sugar company at San Francisco (R. 247).

The clauses referred to by the candy company were these:

- "6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.
- 7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year." (R. 23.)

## Buyer's Notice of Rescission, etc.

Four days later (December 1, 1920) the Chicago counsel for the candy company served upon the sugar company in San Francisco a notice in respect of each contract, which notices were identical except as varied to cover the difference in the quantity purchased un-

der the two several contracts. The first of these notices was as follows:

"November 30, 1920. [Addressed by the candy company to the sugar company] You will please take notice, and you are hereby notified, that the contract entered into on the 14th day of May, 1920, between you and Continental Candy Corporation covering the sale by you of 750 tons \* \* \* of white Java sugar \* \* as subsequently amended to provide for delivery f. o. b. cars Crockett, California, is hereby rescinded, cancelled and declared to be null and void.

"The said contract is so rescinded, cancelled and declared to be null and void for the reason that the same, and the whole thereof, is illegal, fraudulent, null and void because it is in unreasonable restraint of trade and contrary to public interest and policy, and because it is in violation of the anti-trust laws of the United States governing trade or commerce among the several states, or with foreign nations, and governing imports into the United States, and for the further reason that said contract is illegal and void in that it attempts to oust the courts of jurisdiction of any controversy concerning said contract.

"You are further notified and advised that said contract is unilateral and is, therefore, nudum pactum and wholly unenforcible.

"Your attention is further called to the fact that said contract fixes no time for delivery to the buyer, either f. o. b. cars San Francisco, or, as later modified and amended, f. o. b. cars Crockett, California, and by reason of said fact said contract is terminable by either party on due notice.

"Notice is hereby given you that said contract is terminated and cancelled before any delivery has been attempted by you to the buyer, either at San Francisco or at Crockett.

"You are further notified that said Continental Candy Corporation hereby rescinds, cancels and declares to be null and void the said entire contract of May 14th, 1920, because you have failed to comply with the material provision of said contract requiring shipment from Java in September, 1920, of 250 tons of said sugar.

"You are further notified that any steps taken by you for the enforcement of the said contract, or any part thereof, will be for your own risk, loss and damage, and you are especially notified and advised not to value or draw under any of the Letters of Credit furnished you under said contract." (R. 280-282.)

On the same day (December 1, 1920) the Bill of Complaint was filed against the sugar company and the two San Francisco banks with an allegation that the Chicago banks

"are not necessary parties hereto, and neither of them is made a party hereto because neither of them is within the jurisdiction of this Court and process of this Court cannot be served upon either of them." (R. 8.)

An order to show cause and a temporary restraining order were procured on December 1, 1920. The hearing resulted in an order of temporary injunction, December 8, 1920 (Honorable Frank H. Rudkin, D. J.) whereunder the sugar company was still at liberty to fulfill the terms of its contract with the candy company and to draw its drafts against the Chicago banks but forbidden to collect the money. It was provided, however, that nothing in the order should be treated as an injunction forbidding the San Francisco banks from paying the drafts to Walter B. Maling, appointed Special Master with power to receive payment (R. 296-304).

As a condition to the entry of the order of temporary injunction on December 8, 1920, the plaintiff agreed that the final hearing should be had December 27, 1920 (R. 303), and the cause was heard on December 27th and December 28th, 1920, before Honorable Benjamin F. Bledsoe, Judge, and resulted in a final decree dismissing the bill for want of equity (R. 107-109).

Having given an outline of the case it will be next in order to consider the theories upon which the candy company proceeded and how it attempted in the court below to make effectual its repudiation of its contracts.

## (b) The theories of complainant below and here.

In its bill of complaint the candy company claimed that the contracts of May 14, 18, 1920, had been rescinded, cancelled and terminated by it and that they were in effect non-existent (R. 15) because (a) there had been a breach of performance by the sugar company; (b) there were integral provisions of the contracts which were so indefinite and unenforcible against the seller that the buyer was entitled to withdraw from the contracts at pleasure before performance; and (c) there were integral provisions of the contracts which were illegal and therefore the contracts were themselves illegal.

In its bill of complaint the candy company asked for an injunction which, if granted, would have made it impossible for the sugar company to comply with the prerequisites to drafts against the letters of creditfor instance, it sought an injunction (and had a restraining order effective December 1-8, 1920) whereby the sugar company was forbidden to load the sugar on railroad cars at Crockett destined for Chicago. And yet the sugar company had to load the sugar on the cars and obtain bills of lading therefor, in order to comply with the terms of the letters of credit and these had a time limit of December 31, 1920 (R. 274-276).

In order to support its claims to the remedies applied for, the complainant had to formulate theories respecting (a) the unenforcibility and illegality of the contract of purchase and sale of May 14, 18, 1920; (b) the status of the letters of credit issued by the two Chicago banks; and (c) certain questions of procedural law. All of these theories were indispensable to a recovery by the complainant and it will be helpful to an understanding of the case if we briefly deal with them.

# (1) The alleged illegality and unenforcibility of the contracts of May 14, 18, 1920.

Six objections to the contracts were made in the bill of complaint and one additional was suggested at the final hearing, although not mentioned in the bill of complaint. The seven objections were these.

- (a) The shipment from Java was not in time (R. 14-15, 58; notice served December 1, 1920, supra p. 10)—an objection abandoned at the trial (R. 126, 279);
- (b) Although the contracts (R. 22-25) provided for shipment from Java in September and October, 1920, and although the letters of credit required the drafts

to be drawn and the shipping documents to be ready on or before December 31, 1920, there was no time specified for the loading of the sugar on board cars after its arrival in the bay of San Francisco, and therefore the contracts were unilateral and the buyer was at liberty to withdraw therefrom at pleasure before performance (R. 14, 57)—a point which overlooked the fact that it is everywhere the law that a reasonable time is intended where no time of performance is specified, and that this is the California law (Section 1657, C. C. Cal.) by which the contracts are controlled (R. 210, foot; also 236-237);

- (c) The provision which authorized the seller to cancel the contracts "should strikes, wars, revolutions, accidents, dangers of the sea, or other unforeseen events beyond control, prevent shipment or delay delivery" (R. 14, 23) enabled the seller to withdraw from the contracts at pleasure and gave the buyer a like privilege (R. 14, 56-57)—an argument which overlooked the fact that such a clause has been repeatedly upheld;
- (d) The provision of the contracts that "in the event of any dispute arising under this contract, same to be settled by San Francisco arbitration" rendered the contracts illegal as ousting courts of jurisdiction of disputes (R. 13, 54-55), as though it were an attack upon courts to settle disputes out of court. This objection also overlooked the fact that agreements to arbitrate are expressly authorized in California (Sections 1281-1290, C. C. P. Cal.), and indeed everywhere;

(e) Clause 6 of the contracts that:

"buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."

violated anti-trust laws (R. 11, 12, 49, 54)—a point which ignored the fact that it was held the other way in Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165 (1915), which we refer to later in this brief;

(f) Clause 7 of the contracts that:

"sales of this sugar to [buyer] manufacturers constitutes their quota of sugar from [sugar company] \* \* \* from delivery date \* \* \* until the end of the year."

was likewise illegal (R. 11, 49, 54)—a point which overlooked the fact that the sugar company might have refused to sell any sugar whatever to the candy company and that the latter might have refused to buy any sugar, and therefore there could be no illegality in such an agreement.

(g) The seventh point was suggested at the final hearing but not mentioned in the bill of complaint, i. e., that the sugar company was "a monopoly in fact" (R. 146-147) and therefore could not enforce even a valid contract made by it—a point which also overlooked the fact that it was held in Wilder Manufacturing Company v. Corn Products Refining Company, 236 U. S. 165 (1915) that such a point was not available to a litigant similarly situated.

All of these propositions except two—"e" and "f" have been abandoned on the appeal. The plaintiff's

case, so far as the illegality of the contracts of purchase and sale are concerned, turns on the clauses:

- 6. "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same"; and
- 7. "sales of this sugar to manufacturers constitutes their quota of sugar from [sugar company] \* \* from delivery date \* \* until the end of the year."

Indeed, in the brief for appellant no point is expressly made respecting Clause 7 but the clause is introduced into the discussion at page 10, and we shall therefore treat it as a point made by the appellant.

#### (2) The position of the letters of credit

If there had been no letters of credit in the case the candy company would have found it impossible to state a cause of action in equity for the reason that if its legal position were sound it would have had a full defense at law against any action on the contracts which the seller might bring. Recognizing this to be so, the candy company made its cause of action in equity turn upon the letters of credit. The candy company claimed that the Chicago banks were legally bound to pay the drafts drawn by the seller, even if the contracts between buyer and seller were illegal; that the candy company was legally bound to reimburse the Chicago banks for any moneys expended under their letters of credit; and hence the seller should be enjoined from drawing drafts under the letters of credit. The sugar company also claimed that the Chicago banks were bound to pay the drafts drawn by it even if the contracts between the candy company and the sugar company were illegal. This contention by the sugar company is based upon the proposition now to be stated.

The letters of credit created contracts between the bank and the seller only which were independent of and distinct from the contracts of purchase and sale between buyer and seller. The contracts created by the letters of credit did not include clauses 6 and 7 of the contract of purchase and sale, and therefore if those clauses invalidated the contract between buyer and seller they did not invalidate the contracts between the banks and the seller because the contracts created by those letters of credit did not include clauses 6 and 7.

We are not certain that the candy company admits that abstractly letters of credit create contracts between a bank and a seller independent of and distinct from the contract of purchase and sale between buyer and seller. The candy company took no forthright position upon this point either way, but seemed to rest its case upon the proposition that the Chicago banks were legally bound to pay the drafts drawn by the sellers because they did not know of the existence of clauses 6 and 7 when they issued their letters of credit. The bill of complaint therefore alleged that when the banks issued their letters of credit to the sugar company they were not aware of all of the provisions of the contracts of purchase and sale (R. 7, foot). complaint does not allege in terms that either bank was ignorant of the fact that the contracts of purchase and sale contained clauses 6 and 7, but the president of the candy company gives testimony from which this conclusion may be argumentatively deduced (R. 211, 237).

In dealing with the letters of credit the complainant was involved in a dilemma. Once it was admitted that the contracts between the banks and the seller were distinct from the contract between buyer and seller the obligation of the banks to pay arose from the circumstance that they had made valid contracts with the seller. On the other hand, if it were argued by the complainant that the letters of credit were incidental to the contract of purchase and sale it would be forced also to argue that if the contract of purchase and sale was invalid the contracts created by the letters of credit were also invalid. And against this latter argument it could be said that even if the banks did not know when they issued their letters of credit that they were infected with illegality it would have been an easy matter for the candy company to inform them of the terms of the contract of purchase and sale and to warn them that any payments made under the letters of credit would be voluntary and that the candy company would not be bound to reimburse the banks therefor.

## (3) The questions of procedural law here involved.

There are two questions of procedural law here involved (a) whether a case in equity was stated by the complainant even assuming for the purposes of this point that the contracts had been successfully cancelled, etc. by the candy company; and (b) whether the Chicago banks were indispensable parties to the suit.

We have already made sufficient mention of the first of these points and respecting the second we might say that the bill of complaint alleged that the Chicago banks were not necessary parties (R. 8), and that the sugar company by motion to dismiss the bill and in its answer set up non-joinder of the Chicago banks claiming them to be necessary and indispensable parties (R. 30, 48, 78). This same defense was set up in the answer of the First National Bank of San Francisco (R. 40).

The foregoing propositions will be fully discussed later in the brief, but in this connection we here note the fact that as the Chicago banks have since the entry of the final decree paid our drafts drawn under the letters of credit the case is now moot.

(c) The government's control over the necessaries of life, including sugar, from August 10, 1917, to November 15, 1920.

Under the Food Control (Lever) Act, approved August 10, 1917 (40 St. 273) and an executive order of the President of the same date, the United States Food Administration was created and Herbert Hoover appointed United States Food Administrator. On August 15, 1917, George M. Rolph was appointed Chief of the Sugar Division and so remained until his resignation February 15, 1919 (Bernhardt's Government Control of Sugar, pp. 10, 73; also R. 170).

After a tenure of two years Mr. Hoover resigned and the President on November 21, 1919, conferred the powers of the United States Food Administrator "in so far as they applied to wheat and wheat products" upon Julius H. Barnes, Chief of the Cereal Division of the United States Food Administration and all the other powers theretofore exercised by the Food Administrator upon the Attorney General (R. 186-190).

The powers and authority thus conferred upon the Attorney General, which included the surveillance of sugar, continued at least until November 15, 1920, when the requirement of licenses to trade in the necessaries of life, including sugar, was abrogated by a proclamation of the President (R. 202-205).

The Food Control Act above mentioned (40 St. 273), provided, among other things, that:

## The Food Control (Lever) Act.

"It is essential to the national security and defense \* \* \* to assure an adequate supply and equitable distribution, and to facilitate the movement of foods \* \* \* to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, effecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war." (R. 203.)

## And also provided

"that, from time to time, whenever the President shall find it essential to license the importation,

\* \* or distribution of any necessaries \* \* \* and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on such business \* \* unless he shall secure and hold a license issued pursuant to this section." (R. 203.)

In pursuance of the said act of August 10, 1917, the President by proclamation required dealing in sugar to be licensed (United States Compiled Statutes, 1918, page 436).

#### Proclamations of the President.

"September 7, 1917. All persons, firms, corporations and associations engaged in the business either of importing sugar, or manufacturing sugar from sugar cane or beets, or of refining sugar or of manufacturing sugar syrups or molasses, \* \* \* are hereby required to secure on or before October 1, 1917, a license, which license will be issued under such rules and regulations governing the conduct of the business as may be prescribed. Applications for licenses must be made to the United States Food Administrator, Washington, D. C., upon forms prepared by him for that purpose."

"October 8, 1917. All persons, firms, corporations and associations engaged in the business either of \* \* \* importing, manufacturng \* \* \* or distributing (including buying and selling) any of the following commodities sugar, syrups, or molasses \* \* \* are hereby required to secure on or before November 1, 1917, a license, which license will be issued under such rules and regulations governing the conduct of the business as may be prescribed. Application for license must be made to the United States Food Administration, Washington, D. C., Law Department-License Division, on forms prepared by it for that purpose, which may be secured on request."

## Sugar Company Had Sugar License.

On October 3, 1917, the appellee sugar company was licensed by the United States Food Administration to deal in sugar and held such a license until all licenses were abolished by proclamation of the President, effective November 15, 1920 (R. 202-205).

#### General Regulations of Food Administration.

On November 1, 1917, the Food Administration promulgated general rules to control the sugar trade (R. 179-184), among others, Rule 6 reading as follows:

"Rule 6. Resales Within Same Trade Prohibited, When.—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to results in a higher market price to the retailer or consumer, will be dealt with as an unfair practice." (R. 181.)

These rules continued in force after the Attorney General assumed the exercise of the powers conferred upon him by the President November 21, 1919.

While the Food Administration was in charge the government incorporated the United States Sugar Equalization Board, Inc. under the laws of Delaware on July 12, 1918, and was its only stockholder. The act of December 31, 1919 (41 St. 386) authorized it to continue its corporate existence until December 31, 1920.

## Attorney General's Authority Over Sugar.

As already stated, the Attorney General's authority dates from November 21, 1919, and with his assumption of these duties the Attorney General appointed Howard Figg, Special Assistant in carge of the enforcement of the Food Control Act (R. 324), also Allison L. Newton as attorney in charge of the licensing division (R. 335), and J. G. Weatherly "in charge of the Fair Price Commissions throughout the United

States" (R. 324), which were organizations of men and women co-operating with the Department of Justice to maintain fair prices and equitable distribution of necessaries of life in times of stringency (R. 168 foot, 170). The Attorney General looked to the United States Attorneys throughout the country for the enforcement of these laws and regulations.

"The chain of authority \* \* \* so far as the information regarding prices is concerned, the authority to prefer charges, and to make findings of fact as to the violations of license rules and regulations, went direct from the Attorney General to the United States Attorneys; they reported such findings of fact direct to the Attorney General, and such reports were passed upon by A. L. Newton, who approved or disapproved, as the case might be, and passed them on up for the attention of the Attorney General." (J. G. Weatherly, R. 338-339.)

The importance of governmental regulation of sugar even in the year 1920 is shown by a review of the whole situation at pages 180 to 185 of Attorney General's Report, 1920 (R. 308-318), and by the following self explanatory letter (R. 176-177) which came to the knowledge of the sugar company prior to May 14, 1920, through its dissemination to all dealers in sugar and its publication in all sugar journals (R. 178).

"Department of Justice, Washington, D. C., April 29, 1920. The American Sugar Refining Company, New York City. Gentlemen: It was very clearly established at the conference held by me with representatives of the various eastern sugar refiners on April 26, that speculation and resales within the trade were very largely responsible for present unequal distribution and exorbitant prices.

The refiner can very definitely help in relieving this situation by circularizing his trade to the effect that he will distribute to regular customers only, and will refuse to accept any export and toll business except where contracts are now in existence; and he would feel justified in excluding from participation in future allotments any customer who is believed to have sold to speculative buyers.

Į shall insist upon a strict enforcement of Rule 6, of the Special License Regulations, which prohibits resales within the trade. I herewith quote for your information, as well as for that of your trade, this Rule:

'Resales within same trade prohibited, when.— The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.'

I hope that you will give this matter your immediate consideration, sending me a copy of your letter to your regular customers. Yours very truly, (Signed) Howard Figg, Special Assistant to the Attorney General."

In connection with the governmental surveillance of the sugar trade as affecting the particular contracts here involved, it is to be noted that the candy company had no license to deal in sugar until September 9, 1920, and it never applied therefor until June 30, 1920 (R. 221, 194). The president of the candy company stated that he was advised that a license was not needed by his company, but this could be so only for the reason that the candy company was a mere user

of sugar and if it did not buy beyond its requirements it would not be in the market selling sugar.

(d) The 10,000 tons of Java White sugar imported in 1920 and why the contracts contained the clauses which are here attacked.

Early in 1920 as already stated there was a threatened shortage of sugar and prices were high. Owing to strikes in the Hawaiian Islands the sugar company calculated that its supply for the year would be short and in order to provide for the requirements of its customers it bought 10,000 tons of Java White sugar which was being imported from Java. This sugar is not suitable for household use in America, but serves the purpose of manufacturers.

The Department of Justice requested the sugar company to sell this sugar to manufacturers for manufacturing needs only, and it did so. In order to insure the object which the Department of Justice had in mind (the equitable distribution of the sugar) the sugar company introduced into the contracts at the request of the Department of Justice a clause that the sugar was sold for the buyer's own consumption and not for resale, and that it was understood between the parties that no additional sugar would be obtainable by the buyer from the seller between the date of delivery and the end of the year. Three witnesses cover this phase of the case: (1) Andrew A. Brown. sales manager of the sugar company; (2) E. B. Montgomery who was a regular employee of the Department of Justice, in the Bureau of Investigation, and had been assigned to assist Mrs. Adams in the supervision

of the sugar trade (R. 255-256); and (3) Mrs. Adams herself who was United States Attorney from July, 1918, to June 26, 1920 (R. 255). On one phase these witnesses are corroborated by the president of the candy company whose testimony we quote. We also quote the testimony of J. G. Weatherly quoted from in the brief of appellant.

Testimony of A. A. Brown, Sales Manager of the Appellee Sugar Company.

The unsuitability of Java White sugar for American trade is made clear by Mr. Brown's testimony as follows:

"There has been no Java White Sugar, or any other Java sugar, come into this country for years, although I think we bought a cargo in 1911. (R. 156) \* \* \* The sugar that comes from Java is a washed sugar, known as Java Whites. They don't run through the bone coal process. It is not considered refined sugar (R. 157) \* \* \* Java White in its nature is not similar to sugar used in households in this country. [The difference consists] in its general large grain and appearance. There has been no trial of it in households because it has not been shipped to this country for a great many years until this year. It is made from cane and is a wash process, primarily made for the East Indian market, because the East Indian will not use refined sugar [produced by a purification of the sugar through the use of bone coal, a calcined animal charcoal (R. 154)], the ox being a sacred animal. they will not touch it. During the period of shortage it was diverted all over the world. It has the same percentage of sugar as refined, though not quite as white in color; the grain is larger and much coarser, and not pleasing to the eye, such as the American housewife wants. Java White sugar

is primarily for the Indian market, or direct consumption in certain countries which have been using it for years, such as the Levantine nations and England for manufacture. It is suitable for manufacturing purposes such as canned fruits, outside of very white juice fruit, such as Bartlett pears; for peaches or for apricots, or for anything of that nature, having an ordinary dark juice, it would serve the purpose." (R. 158, 159.)

In explaining why the sugar company bought the 10,000 tons of Java White sugar, Mr. Brown testified:

"[Early in 1920] all sugar people believed there was going to be a big shortage, it looked very much like it, especially early in April, when disquieting news came as to the condition of the Cuban crop; the market for raw sugar became very much excited; people plunged and bought everywhere all over the world for the United States." (R. 173.)

"They had a strike in the Hawaiian Islands, sugar was not coming promptly. We bought sugar to aid our customers to have sufficient supplies." (R. 159.)

In explaining why clauses 6 and 7 were introduced into the contracts for the sale of the 10,000 tons of Java White sugar, Mr. Brown said:

"Under instructions from the Department of Justice we refused to sell these 10,000 tons, or any part of it, and we wired our agent, declining to sell. Mr. Montgomery informed me about the orders coming from his superior in the Department of Justice, Mrs. Annette Adams. We refused to sell Java White sugar to wholesale grocers in the Middle West because we were instructed to confine the sale of Java Whites to manufacturers, in order to release a larger amount of our regular refined to the consuming public. Pursuing this course, it would enlarge the quantity of sugar available in

the household to the extent that the manufacturer could not call on me for my refined sugar. only through the directions of the Government, but as a sugar man. I knew that that would be the effect. By selling to manufacturers, and by forbidding them to resell, we sought to bring about the use of Java Whites by them which the householder would not take, owing to its forbidding aspect. [Q. Was that the only motive of your company in requiring the buyer to agree that it was for his own consumption, and not for the purpose of resale?] \* \* \* As far as I know, it was merely trying to follow out the rules of the Department of Justice (R. 160-161). Clause 6 was put in to the contract on the verbal say-so of Mr. Montgomery, and also the Fair Trade Commission. who were working in conjunction with Mr. Montgomery's superior, Mrs. Annette Adams. The Fair Trade Commission was formed under the Department of Justice. H. Clay Miller was the chairman. Mr. Montgomery and Mr. Miller told me that I must put in a clause that it was not for resale. Mr. Montgomery told us that Mrs. Annette Adams wished us to sell this sugar to manufacturers only, and that they had to use it in their own manufacturing, and not to resell for profit; it could not be passed on; that we had to put that in our contract. Furthermore, in supplying them with this amount of sugar, they could not call on us for any further refined sugar." (R. 168-169.)

# Again, Mr. Brown testified:

"I am familiar with clause 7 which appears in the contracts of May 14th and May 18th, 1920. In taking this sugar for their requirements, they could not call on us for any more of our own sugar. That was supposed to be their quota, as far as we were concerned, from the time we delivered it, for the rest of the year. The allotments were a kind of a prior matter, in one sense, although at the time we did this, we were acting under orders, you might say, of the Department of Justice. Clause 7 was introduced by the direction of the Government." (R. 164-165.)

### Mr. Brown also testified:

"Q. Are you sure that you made no contracts for Java sugar with anybody besides actual manufacturers? A. Yes, sir. Q. No wholesale grocers? A. Absolutely none. Q. And nobody in the trade except those that were going to use it? A. Except those that were going to use it. Q. Did you make any contracts with canners? A. Not for any of this sugar. Q. Were they all candy manufacturers? A. There were no canners. \* \* \* The National Biscuit Company \* \* \* took some. The Corn Producers Company took some. \* \* None of it was sold for direct consumption, or to groceries. I can assure you of that." (R. 167-168.)

Mr. Brown also testified that these clauses did not appear in any contracts except the contracts respecting the 10,000 tons of Java White sugar.

"The contracts for sugars refined by our company did not contain that clause [Clause 6 for buyer's own consumption, and against resale]. That clause was confined entirely to the specific 10,000 tons of Java Sugar sold at this one price [19.85 cents]. \* \* \* We bought some [Java sugar] [in addition to the 10,000 tons] (R. 155). \* \* \* We bought altogether \* \* \* a little in excess of 11,000 tons white and 6000 short tons of raw Java. \* \* \* We refined the balance of the white [1000 tons] and we refined the raw [6000 short tons]." (R. 155-156.)

## Mr. Brown also testified:

"Q. As I understand it, neither clause 6 nor clause 7 was in the contract whereby you sold your own refined sugar. A. No, sir. Q. But they were

introduced into this 10,000 ton lot? A. Yes, sir. Q. And you refined the extra thousand tons of Java White which you obtained, did you? A. Yes, sir. Q. So that never came into a Java White contract? A. No, sir." (R. 165.)

Speaking of the method of distributing the sugar, Mr. Brown testified:

"We tried to distribute it fairly. Instead of allowing a man to select the quantity he wanted, we distributed it on past performance over the country in which we formerly did business. (R. 159-160.)

\* \* In making allotments of sugar we took a block of sugar, as the raws arrived, and in the refined form we allotted it all over the sections of the country where we did business, on the basis of past performance of the people to whom we allotted it, based on their past purchases; that is, such a percentage of what we had on hand as would be equal to the percentage of ratio which was established amongst them in the history of their purchases from us." (R. 163.)

## Telegram May 5, 1920 Sugar Company to Brokers.

The foregoing is in harmony with the telegram sent by the sugar company to its Chicago brokers through whom the sale to the candy company was affected.

"San Francisco, May 5, 1920. We have permission from the local authorities to sell the Java Whites with following restrictions First Sale to manufacturers only for their own manufacturing needs and under no circumstances are they to resell. Second Sales of this sugar to manufacturers to constitute their quota of sugar from us from delivery date of Java Whites until end of year. Stop \* \* \* All shipment from Java in the months

named nineteen eighty-five net landed weights fob cars San Francisco. Letters of credit covering. Stop Under ruling must decline Kohl Grocer Quincy three hundred tons. Stop \* \* \* In line our letter April twenty-third sale these sugars to manufacturers is expected to release later an equal amount of our output to jobbers. Stop you have ample time to sell balance \* \* \* Leave disposition balance in your hands." (R. 171-172.)

### Testimony of Benjamin Schneewind, President of the Candy Company.

The above is in harmony with the statement made by the broker of the sugar company in May, 1920, as given in the deposition of the president of the candy company, as follows:

"In May, 1920, prior to my conversation with Mr. Tennison, who represented the Seavey & Flarsheim Brokerage Company, we were unable to obtain any cane or beet sugar contracts for fall delivery at a fixed price. The Seavey & Flarsheim Brokerage Company are sugar brokers, representing the California & Hawaiian Sugar Refining Company, one of the defendants in this case. They have an office in Chicago, and also, I think, in St. Louis and in Kansas City. \* \* \* The contracts attached to the bill in this case \* \* \* dated May 14th and May 18th, 1920, respectively, were signed by me about on the dates they bear. The contracts were entirely drawn up and prepared before I saw

<sup>5</sup> The effect of selling the Java White sugar to manufacturers for manufacturing needs only is here clearly brought out. Once the sugar company was able to satisfy the requirements of its customers who were manufacturers by selling to them Java White sugar upon the agreement that it would be used by them for their own manufacturing needs, the sugar company would be better able to serve the jobbers who, in turn, would sell the sugar to retailers or directly to ultimate consumers. In this way the searcity of sugar for domestic consumption would be less severe. For definitions of "wholesaler", "jobber" and "retailer", see Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (C. C. A. 2nd Ct. 1915).

them, and were presented to me by Mr. Tennison. After the first presentation to me of the contract of May 14, 1920, I asked Mr. Tennison why there was a clause in there restricting the sale, and why it was our quota from the California & Hawaiian Sugar Refining Company for the balance of the year; and he stated that they, the California & Hawaiian Sugar Refining Company, could not sell any sugar without those provisions in the contract.

\* \* I signed three copies of each contract and they were all sent to California for signature. I received one copy of each of them back, executed by the California & Hawaiian Sugar Refining Company, some time about the middle of June." (R. 208-210.)

#### Testimony of E. B. Montgomery of the Department of Justice.

We pass now to the testimony of Mr. Montgomery.

Mr. E. B. Montgomery was a regular employee of the Department of Justice, in the Bureau of Investigation, and had been assigned to assist Mrs. Adams in the supervision of the sugar trade (Mrs. Adams' deposition, R. 255-256).

In the course of his official duties Mr. Montgomery became acquainted with the officers of the sugar company early in 1920 (R. 248); was in the office of the company as often as two or three time a week (R. 254); and was familiar with the purchase of 10,000 tons of Java White made by the company, and its resale (R. 248).

Mr. Montgomery testified that prior to May 14, 1920, he dealt with the officers of the sugar company in respect of the matter of the sale by it of the 10,000 tons of Java White, and said that he had received his instructions from Mrs. Annette Adams and those in-

structions he communicated to Mr. A. A. Brown, Sales Manager of the defendant sugar company. What he told them was as follows:

"I informed them that the United States Attorney had instructed me that the sale could be made, provided it was sold to manufacturers for manufacturing purposes only, and was not to be resold; also that the manufacturers purchasing the sugar would have to understand that it was their quota C. & H. [California and Hawaiian Sugar Refining Company] sugar for the year, and that the C. & H. [California and Hawaiian Sugar Refining Company] would observe that condition." (R. 253.)

# Testimony of Mrs. Annette Abbott Adams, United States Attorney at San Francisco.

This brings us to the testimony of Mrs. Annette Abbott Adams, United States Attorney from July, 1918, to June 26, 1920, who had charge in San Francisco of the surveillance of the sugar trade under the direction of the Attorney General (R. 255) from a date earlier than January 1, 1920, to a date later than May 18, 1920. In explaining the whole situation, Mrs. Adams testified:

"We were endeavoring, as a part of our work in reducing the high cost of living and enforcing the Lever Act, to bring about the same equitable distribution of sugar that had been had under the Food Administration and the Sugar Equalization Board. There was no legal provision that the sugar should be so distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the business which they had transacted with them theretofore. In other words, each wholesaler, when a particular lot of sugar was ready for distribution, was to have his proportionate share of that sugar. And we were endeavoring to prevent any wholesaler or any retailer or any manufacturer from hoarding sugar; that is, from obtaining a portion or contracting for a greater supply of sugar than he needed for his immediate needs, for his reasonable use, for a reasonable time, which is the language of the Act. In order to do that, the cooperation of the refiners was necessary and important, and therefore we asked the refiners [to cooperate].

[Subsequent to the middle of April, 1920] Mr. Montgomery discussed with me the proposition of the Hawaiian Sugar Company selling some Java sugar to some manufacturers in the Middle West. and asked if we could have any objection to that sale. \* \* \* and finally we agreed that we would offer no objection to their forwarding it if they would see to it that that sugar went into the hands only of the consumer. In other words, that it would not go into speculative channels. And, therefore, that agreement was made by the sugar people, that if they sold this sugar that they would see to it that the sugar went into the hands of bona fide consumers and not the hands of dealers who would resell it. \* \* \* In the term 'consumer' I include a manufacturer of candy. ultimate consumer in our idea was the housekeeper and the manufacturer. \* \* \* We regarded them as consumers. In general the rules and regulations were those that were laid down by the Food Administration, that sugar must go in a direct line from the refiner to the consumer; that if the sugar was sold to a manufacturer, it would go, might go, from the refiner direct to the manufacturer; if it was sold to a wholesaler, it must go from that wholesaler direct to a consumer, or to a retailer. and from the retailer it must go into the hands of a consumer, and that there should be no resale by any person to whom that sugar was sold as one in the chain of handlers. In making the statement

that there was no legal requirement. I am just quoting the rules and regulations \* \* there was the hoarding provisions always in force. That was held to support us by our construction. Our construction was 'more than reasonable needs for a reasonable period'. \* \* \* We only consented to this sale to the manufacturer on the understanding and assurance to us \* \* \* that this was an ultimate consumer and not a seller. \* \* \* had to prevent \* \* \* people from buying more sugar than they needed to meet their needs. \* \* \* Our rule was to prevent him from securing a surplus, not to prevent him from selling it, but our rule was to prevent him from getting it in the first place \* \* \* [Our] agreement with the refiners was that the refiners should not sell to persons who were not bona fide manufacturers. \* \* \* stating what limitations were put upon Hawaiian Sugar Company in selling this sugar to the Middle West people. \* \* \* The Food Administration rules were in a sense in effect We used them as a guide, and we required that the people should live up to those rules and regulations. Of course, if they wanted to engage in the sugar business, they had to secure a license. Licenses were issued from Washington, but, of course, application for license renewals in many instances came thru us, and we recommended or refused recommendations that they be granted." (R. 257-263.)

Speaking of the Act of December 31, 1919 (41 Stat. 386), and counsel's inquiry respecting the free distribution of sugar and the abolition of the policy of zoning, Mrs. Adams testified:

"We attempted equitably to continue the allotment that had been followed under the zone system. \* \* \* We tried to distribute it [sugar] freely and in as fair ratios as possible; in other words, keep anybody from hoarding. \* \*

[In the matter of resales within the trade] we would be interested in knowing as to how that man got that much sugar because he had gotton \* more sugar [than he needed in his business]. There were several instances where permission was requested from us to sell sugar that had overaccumulated. \* \* \* We made requests [of the refiners] which we could not enforce. could ask them not to sell to John Smith any more than John Smith was entitled to equitably, and that is what we did do: \* \* \* we asked them to distribute it to all of the wholesalers who were legitimate wholesalers, in proportion to their trade. If the sugar company insisted upon selling sugar in violation of this Act | their license. of course, might be taken away from them and that is a pretty good weapon. We asked the refiners and the people whom we considered qualified to see that no man got more than his quota. In other words, that a proportionate amount of sugar was distributed and that there be no more than their ordinary business demanded. In other words, we wanted them not to sell to anybody that would hoard \* \* \* and of course, in the manufacturing, that they should get no more than they needed for their legitimate manufacturing needs and that no buyer should buy more than his legitimate trade called for. \* \* \* We were asked with regard to selling the sugar to a manufacturing concern, and we regarded them as an ultimate consumer. Of course, we considered them as the ultimate consumer under those conditions." (R. 264-273.)

### Testimony of J. G. Weatherly.

J. G. Weatherly had been connected with the Department of Justice for some time prior to November 6, 1920, when he severed his connection therewith (R. 337). The Food Administration became a part of the work of the Attorney General November 21, 1919. Within

that period Mr. Weatherly had been an "assistant in charge of the Fair Price Commissions throughout the United States" (R. 324), but he had had nothing whatever to do with the supervision of United States attorneys when engaged in the work of the Food Administration. They reported to and were under the supervision of Allison L. Newton (R. 338, foot). In fact, Mr. Weatherly's only connection with the licensing of sugar and other dealers by the Department of Justice commenced long after the transactions here involved had occurred, i. e., from September 1, 1920, to November 6, 1920 (R. 337, 340, lines 13-16). Before that time, if not throughout the period just mentioned, Allison L. Newton, had immediate charge of the licensing division (R. 335, lines 5 to 8).

In view of the foregoing Mr. Weatherly's testimony that the Department of Justice did not authorize or insist upon the introduction of clauses 6 and 7 into the contracts of May 14, 18, 1920 (R. 328-329) is to be laid aside as the evidence of a witness not familiar with the subject-matter, particularly when the two witnesses who had charge of the matter (Mrs. Adams and Mr. Montgomery) testified to the contrary.

We quote the following testimony from the cross-examination of Mr. Weatherly which makes it clear that he had no connection with the Food Administration through the United States attorneys and that he was limited to the work of Fair Price Commissions.

"I was not concerned immediately with the licensing provisions, that was not under my department. I was concerned with regulation of the licenses as

prescribed in the proclamation only in this way, that the Fair Price Committees were charged with the duty of, as far as possible, seeing that the licenses conformed to the Rules and Regulations. and with that idea in mind I issued instructions. The chain of authority through the immediate office of the Department of Justice, so far as the information regarding prices is concerned, the authority to prefer charges, and to make findings of fact as to the violations of license rules and regulations, went direct from the Attorney General to the United States Attorneys; they reported such findings of fact direct to the Attorney General. and such reports were passed upon by A. L. Newton, who approved or disapproved, as the case might be, and passed them on up for the attention of the Attorney General." (R. 337-339.)

# Mr. Weatherly also testified:

"Q. Can you state along the same line whether you would consider the acquiring by a candy manufacturing company of more sugar than they needed for manufacturing in the nature of hoarding? If it were deliberately required, if they acquired a surplus supply, an abnormal supply, yes, it would The Department of Justice took steps to prevent such abnormal acquisition of supplies in excess of the real needs of the manufacturers who used sugar in their business, to the extent of warning the candy manufacturers against acquiring larger stocks than their business and conditions warranted. and to the extent of warning, or, rather, cautioning, or, better still, of asking the co-operation of the refiners in refraining from selling them an abnormal quantity of sugar, or quantities greater than their accustomed demands would warrant. Now, on that point, whenever the Department of Justice wanted the co-operation of the refiners to do thus and so, and to refrain from doing thus and so, in order the more effectively to control the sugar situation in accordance with the Act, I, or the Fair Price Committee, or both, might call on the refiners in that matter, or it might come from the department, or the United States District Attorney, or Mr. [Howard] Figg [special assistant to the Attorney General in charge of these matters]. \* \* \* I, personally, never asked the co-operation of the refiners to do any acts or refrain from doing any acts, but the Fair Price Commissioners did occasionally call on them for assistance in certain matters." (R. 341-342.)

- (e) A number of facts other than those already mentioned bear upon the questions involved and those facts are here assembled.
- (1) The total consumption of sugar annually in this country would be, roughly, 4,500,000 long tons, five-eighths for household purposes and three-eighths for manufacturing purposes. In the year 1919 the consumption was 4,098,000 tons (R. 161-162). In other words, the 10,000 tons of Java White sugar is a little less than one-fourth of 1% of all of the sugar consumed in this country in that year and the 1250 tons here involved is a trifle less than one thirty-second of 1% of the consumption.
- (2) In 1920 when these contracts were made there were eighteen or twenty refineries in this country producing 3,750,000 long tons, and about one hundred beet sugar factories manufacturing about 1,000,000 short tons (R. 174).
- (3) In 1920 the sugar company melted a little in excess of 400,000 short tons (R. 173). In other words, the 10,000 tons (long) of Java White sugar was less than 2.7% of the entire output of the sugar company for the year 1920, and the 1250 tons about one-third of 1% of the sugar company's output for that year.

- (4) The candy company took over an established business and itself commenced business May 1, 1919, and during the first year of its corporate existence which ended April 30, 1920, it had used in its business approximately 12,000,000 pounds of sugar (R. 207). The president of the candy company was seeking sugar for its second business year which commenced May 1, 1920, but he found it impossible to obtain sugar for fall delivery at a fixed price elsewhere and that is why he bought the Java White sugar (R. 208-210). The purchase here involved was only one-fourth of the amount of sugar used by the candy company in the preceding year. 1250 tons of 2240 pounds makes 2,800,000 pounds. There was at the time, therefore, no question but that the candy company would have need of 2,800,000 pounds in its business, and therefore there was clearly no burden imposed upon the candy company in requiring it to covenant that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same". The candy company had no other sugar, which it had agreed not to resell (R. 235).
- (5) When the candy company made the contracts of May 14, 18, 1920, it seemingly had no purpose whatever to sell any part of the sugar which it was purchasing for it had no license to sell sugar, had made no application for any such authority until June 30, 1920, and was not granted such authority until September 9, 1920 (R. 221, 194). It is said by the president of the

candy company that he had been advised that he needed no license, but he was not manufacturing or selling sugar—he was merely buying sugar to be used in making candy.

When the contracts of May 14, 18, 1920, were executed, the candy company was looking forward to a much larger business in its then second year than it had in its first year. These anticipations were justified for the months of May, June and July but the tide turned in August as will appear by the following table (R. 212-213).

	1919	1920
May		75% Increase
June	500,000	927,000
July	582,000	714,000
August	1,327,000	422,000
September	1,828,000	684,000

- (6) The candy company in effect, affirmed and reaffirmed its contracts upon the several occasions to which we have referred (supra, pages 8-9), and it did not attempt to terminate the contracts until the "bottom" had fallen out of the price of sugar (see table of prices, R. 162-163).
- (7) The candy company made no effort whatever to be relieved of its covenant that the sugar was purchased for its own consumption and not for resale, which adds proof that its later objection to the covenant

was not really a grievance but a subterfuge. The candy company was notified on November 27, 1920, that the sugar was arriving in San Francisco Bay and its counsel from Chicago was then in San Francisco preparing to repudiate the contracts upon the ground that the contracts were illegal (R. 245-247), inasmuch as therein the resale of the sugar was covenanted against. The candy company made no application to the sugar company to be relieved from the covenant (R. 238, 239) and made no application to the Department of Justice for such permission. It is also to be kept in mind that on November 15, 1920, the licensing of dealers in sugar had been terminated by Presidential proclamation (R. 202-204).

- (8) The sugar company bought the Java White sugar in a period of high prices and to guard against loss and in conformity with usage it resold, in all probability immediately. The candy company desired the sugar, bought at high prices and only repudiated the contracts when the prices had fallen 60%, and if it were successful in that repudiation it would throw the loss upon the sugar company.
- (f) The position of the Chicago and San Francisco banks from the commencement of the action (December 1, 1920) to the final hearing (December 27, 1920).

The two San Francisco banks were parties to this action, but neither of the Chicago banks was a party.

As already appears, the Canton Bank wrote the sugar company August 13, 1920, "assuring you of our pleasure to negotiate your documentary bills drawn in compliance with the terms of" the letter of credit of the Great Lakes Trust Company (R. 319-320). The Canton Bank wrote the sugar company again on August 24, 1920, and October 4, 1920 (R. 320). The Canton Bank wrote the sugar company a fourth letter on the day of the commencement of this action, before the complaint had been filed, but after the alleged rescission of the contracts by the candy company (R. 291, 322). This letter was as follows:

"San Francisco, December 1, 1920. [Addressed by the Canton Bank to appellee sugar company] Re: Great Lakes Trust Co. Credit No. 1073. In review of the complex questions which have lately arisen, we wish to advise you that we are no longer willing to negotiate drafts drawn against the above letter of credit. We communicated with you regarding it, only as a matter of courtesy to our Chicago friends, the Great Lakes Trust Co. We therefore do not feel justified in deciding any technical questions which might arise at the time drafts are presented." (R. 291-292.)

In other words, the Canton Bank took the position expressed by its counsel at the trial (R. 135), that by none of the letters which it had written to the sugar company was it bound to negotiate the drafts for the account of its correspondent, the Great Lakes Trust Company.

On the other hand, the First National Bank of San Francisco admitted that by its correspondence it did, and had intended to make itself an obligor in respect of the obligations of the First National Bank of Chicago (see letter June 8, 1920, R. 137-141).

As already stated, the action was commenced December 1, 1920, and a restraining order was obtained which remained in force until December 8, 1920, when it was superseded by an order of temporary injunction (R. 296-304). Two days later the First National Bank of San Francisco wrote the sugar company advising it that but for the embarrassment under which it labored in consequence of the injunction, the First National Bank of Chicago stood ready to pay the drafts (R. 137-139).

December 22, 1920, the sugar company had its drafts and shipping documents in order and presented them to the Canton Bank and the First National Bank (see these drafts in full, R. 284-285). As the Canton Bank had declined the status of correspondent or representative of the Great Lakes Trust Company in respect of

<sup>6</sup> The letter of credit of The First National Bank of Chicago (supra, pp. 6-7) says that "this credit is confirmed and irrevocable". There is no doubt that it was an irrevocable letter of credit and that it became a confirmed letter of credit when The First National Bank of San Francisco assumed liability therefor.

<sup>&</sup>quot;Credits are also classified as confirmed and unconfirmed; and by many the distinction between a confirmed and irrevocable credit is not clearly understood. Where a foreign bank opens a credit in favor of an American seller of goods to be exported, it usually cables its advice of the credit to its American correspondent, which, in turn, advises the seller that it has received this cable credit from the opening bank. The credit may be revocable or irrevocable upon the part of the foreign opening bank. The American bank merely transmits the message for its foreign correspondent, assuming no liability on its own part. If, however, the American seller is not willing to rely upon the irrevocable credit of a foreign bank, he may ask the American bank itself to agree to honor his drafts. If the American bank agrees to do this, the American seller has not only the irrevocable obligation of the foreign bank but the confirmation of the American bank; and the credit is both irrevocable and confirmed." (Documentary Letters of Credit, Carl A. Mead, 22: Columbia Law Review, 299, issue of April, 1922.)

the matters here involved the sugar company communicated by telegraph directly with the Great Lakes Trust Company at Chicago, and what occurred between them is shown by telegrams dated (a) San Francisco, December 22, 1920 (R. 130); (b) Chicago, December 23, 1920 (R. 128); (c) San Francisco, December 23, 1920 (R. 132); (d) Chicago, December 24, 1920 (R. 129); and (e) San Francisco, December 24, 1920 (R. 132).

These telegrams all show that but for the existence of the order of temporary injunction, the Great Lakes Trust Company would have paid the draft drawn upon it. The First National Bank of Chicago and the First National Bank of San Francisco stood ready to pay the other two drafts and would have done so but for the interpretation which was put upon the order of temporary injunction by counsel for the First National Bank of San Francisco (see its letter, December 23, 1920, R. 292-294; also Mr. McEnerney's remarks, R. 141).

It is thus to be seen that with a full knowledge of all the facts and circumstances, the two Chicago banks were prepared to honor our drafts drawn on the letters of credit except for the fact that their freedom to do so was interfered with by the injunction, as interpreted by them.

# (g) The drafts have been paid by the Chicago banks since the entry of the final decree.

The final decree was made December 28, 1920, and dissolved the interlocutory injunction as of noon December 29, 1920 (R. 107, 362, 364 foot).

Immediately after the time fixed for the dissolution of the order of temporary injunction, the sugar company presented its three drafts and shipping documents at the counters of the First National Bank of San Francisco where they were paid, two of them aggregating \$300,000 for the account of the First National Bank of Chicago, and the third for \$255,800 for the account of the Great Lakes Trust Company, and these two banks thereupon became the owners of the shipping documents which stood in place of the 1250 tons of Java White sugar.

# (h) Certain subsidiary matters in the Brief of Appellant call for and here receive correction.

There are two or three points of subsidiary significance which we will dispose of in a summary way here rather than in the main arguments presently to be made.

- 1. In the brief for appellant (page 2) the letters of credit are spoken of as though they emanated from the two San Francisco banks. It is to be noted, however, that they were in fact the letters of credit of the two Chicago banks.
- 2. Although dealt with in the brief for appellant (p. 20), "the zoning system" has nothing to do with this case. This "system" was inaugurated by the United States Sugar Equalization Board, Inc. upon its incorporation (supra, page 23). Under said system the country was divided into zones of distribution, each zone to be supplied from the nearest and most effective sources of supply. The act of December 31, 1919 (supra, page 23) which continued the corporate existence of the above Board until December 31, 1920, provided that

the system of zoning should be abolished and that sugar should freely circulate throughout the country from all sources of supply—in other words, that each manufacturer and dealer might sell his sugar in all parts of the country without being limited to any zone or territory. Obviously, therefore, neither the zoning system nor its abolition has anything to do with clauses 6 and 7 involved in the contract here under consideration.

In the brief for appellant (page 3) the point is made that the sugar company placed no restrictions against resale upon any of the refined sugar which it disposed of in its business. To this there is a two-fold and very obvious answer. The refined sugar being suited to household consumption (as well as to manufacturing purposes), was sold to jobbers whose business is to resell and whose contracts of purchase necessarily could not contain a provision against resale. The Java White sugar, being suited to manufacturing purposes only, was sold for use in manufacturing only, and sales of this sugar appropriately carried provisions against resale. In other words, a manufacturer has peculiar needs for sugar, namely, for his own consumption. whereas the only need a jobber has for sugar is to resell it.

# Argument.

(1) A contract of sale and purchase of goods which contains a clause whereby "buyer (a manufacturer using sugar) agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same" does not violate the Sherman Act; and it was so decided in Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165 (1915).

At the outset it is to be noted that the provision in the contract whereby "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same" is a covenant of the vendee and not a condition; so that a breach would not give ground for forfeiture but merely an action by the vendor for damages. (Hale v. Finch, 1 Wash. T. 567; affirmed, 104 U. S. 261; "Condition", 2 Words and Phrases (1st Series), 1397; 1 Words and Phrases (2nd Series), 863.)

It is also to be noted that provisions in contracts restricting the use of commodities sold (whether such provisions be conditions or covenants) are quite common.

A manufacturer of cement may sell cement to a dealer restricting its use to the construction of a designated courthouse, and provide that "the buyer shall have no right to resell or to loan the same, or to assign this contract" (*Iola Portland Cement Co. v. Ullmann*, 159 Mo. A. 235, 241, top 248, 140 S. W. 620, 623, (1911), column 2, near bottom, 624, column 1, middle). Bankers may (as through the war) refuse credit to aid new enterprises upon the ground that the banking resources

of the country are no more than adequate to protect existing enterprises and the more pressing requirements of the times. Manufacturers may limit their sales to ultimate consumers only (Ford Motor Co. v. Boone, 244 Fed. 335, 340), or to wholesalers only (Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46). License laws in this country (before prohibition) and in England created a taxed class of those who dealt in food and drink to be consumed on the premises. Passing from personal property to real property we may note the frequent sale of real property with important restrictions concerning building etc.

We have not been able to find any decision declaring that a contract for the sale of commodities wherein the buyer agrees that the goods are purchased for his own consumption and not for resale is invalid—in fact, the authority to impose such a restriction arises out of the right of the owner of the commodity to withhold it from sale, and if he sell, to impose conditions in respect thereof.

"As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy." (Smith v. S. F. & N. P. Ry. Co., 115 Cal. 584, 605. 1897.)

"Admittedly the plaintiff has the right to sell its cars where and to whom it may choose, and for such price as it may see fit. It may decline to deal with the trade at all, and dispensing with middlemen, sell directly to users, by mail, or through traveling salesmen or local agents. Accordingly it may lawfully appoint an agent at Portland authorized to sell its cars, limiting his authority to sales within a prescribed territory, and to users, and for a fixed price; and it may impose as one of the conditions of sale that it will not pass title except to the ultimate user and after such price has been paid in full." (Ford Motor Co. v. Boone, 244 Fed. 335, 340, C. C. A. 9th Ct. 1917.)

"I am unable to see any inequity or violation of public policy in the agreement by the purchaser of a chattel that he will not resell it within a reasonable period. The purchaser gets all that was offered him, and all that he paid for, and the vendor maintains the market price by an agreement that the purchaser will not compete with him by selling the book within a limited period. To consider this as an unlawful agreement in restraint of trade would be straining the matter." (Authors & Newspapers Ass'n v. O'Gorman Co., 147 Fed. 616, 620 C. Ct. Rhode Island, Brown, D. J., 1906.)

"'Parties to contracts have the right to insert any stipulations that may be agreed to, provided that they be neither unconscionable, nor contrary to public policy.' \* \* \* 'One may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights.' \* \* \* 'It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It is well said by Sir George Jessel, M. R., in Printing, etc., Co. v. Sampson, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those

rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.'" (Quotations made by this Court in Robinson v. Thurston, 248 Fed. 420, 423-424. 1897.)

In this case there is no element whatever of a restraint of trade. The candy company was a manufacturer of commodities requiring sugar and not a dealer in sugar. The sale here involved facilitated its trade as a manufacturer (which it was) and cannot be said to have restrained its trade as a dealer (which it was not). The amount of sugar involved was less than one-fourth of the estimated annual requirement of the candy company. Even in the events which happened the restriction imposed was not burdensome for no other sugar purchased by the candy company carried an agreement against resale (R. 235). It might therefore have sold the other sugar—in fact did so (R. 235)—and used the sugar here involved in its business as a manufacturer and thereby promoted its own trade.

The fall in the price of sugar, however, put it in a position where it could buy other sugar at a much lower price than the price for which it had agreed to pay for the sugar here involved. Therefore, instead of utilizing the sugar for its legitimate business it sought to repudiate its contracts. As already stated, we have found no case to justify an argument that a contract for the sale of commodities is invalid if it is agreed by the buyer that the commodity is for its own consumption and not for resale. On the other hand, it has been explicitly decided by the United States Supreme Court that such a contract is not invalid.

Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, was a suit brought in Georgia by the above named refining company against the above named manufacturing company to recover the contract price of two lots of glucose or corn syrup. In its answer, the defendant pleaded, among other things, that the contract was invalid under the Sherman Law because it contained a clause that the goods were sold "for your [buyers] own consumption only, and not for resale". The answer was stricken out as one presenting no defense and judgment entered for the plaintiff. The Court of Appeals of Georgia affirmed the judgment (11 Ga. App. 588, 75 S. E. 918), and its decision was in turn affirmed by the United States Supreme Court (236 U. S. 165).

In disposing of the defense based upon the above provision in the contract, i. e., "for the [buyers] own consumption only, and not for resale", the Court of Appeals of Georgia said:

"It is further alleged in the answer that each order for goods bought by the defendant contained a clause reciting that the goods are sold 'for your own consumption only, and not for resale'. A covenant by the buyer of property not to use the same in competition with the business retained by

the seller has been held to be valid. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. Ed. 122, citing Hitchcock v. Anthony, 83 Fed. 799, 28 C. C. A. 80, and American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634. If not valid, it is incapable of enforcement, and does not restrain the purchaser from reselling the goods at his pleasure." (11 Ga. App. 602, 75 S. E. 924, c. 2 foot.)

A writ of error was sued out of the United States Supreme Court and in narrating the proceedings below, that court said:

"On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the manufacturing company for the price of the goods, as sued for, \* \* \* This judgment was affirmed by the court below. (11 Ga. App. 588, 75 S. E. 918), and because of an assumed failure to give effect to the anti-trust act of Congress this writ of error was prosecuted." (236 U. S. 171.)

The court then dealt with the defenses set up by the manufacturing company, and speaking of the provision "for your [buyers] own consumption only, and not for resale", said:

"The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to \* \* \* the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we

can see no ground whatever for holding that the contract of sale was illegal because of these conditions." (236 U. S. 172-173.)

Thus we have the decision of the United States Supreme Court that a contract of sale which contains a provision that the goods are sold "for your [buyers] own consumption only, and not for resale" does not violate the Sherman Act.

In line with the foregoing we cite the following additional cases.

In Phillips v. Iola Portland Cement Co., 125 Fed. 593 (C. C. A. 8th Ct. 1903), the company, a Kansas manufacturer of cement, recovered damages from Phillips for the breach of a contract of sale of cement which had been made by the company with Parr & Company of Texas, of which firm Phillips was a member.

In breach of its agreement the purchaser refused to accept and pay for the cement, and Phillips, the only defendant served with process, defended upon the ground that the contract was illegal under the Sherman Law because it provided that Parr & Company should not sell the cement, ship it, or allow it to be shipped outside the State of Texas.

The court held that the defense was without merit and said:

"\* \* the facts of the case in hand leave no doubt that there was nothing in the contract before us obnoxious to the provisions of the antitrust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the state of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the states, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the act of July 2, 1890." (p. 595.)

Meyer v. Estes, 164 Mass. 457, 41 N. E. 683 (1895), was an action for damages arising out of the sale by the plaintiff to the defendants of electrotype plates. The defendants were publishers of books and they agreed not to sell the plates to other parties or to multiply them for the purpose of sale. In violation of this agreement they sold the plates to Houghton, Mifflin & Co.

The court held that the latter was unaffected by the agreement but that the defendants were liable for damages consequent upon their violation of the covenant.

In the opinion it is said:

"It sufficiently appears that the plaintiff, at the date of the agreement, was the general owner of the plates, and of the right to multiply, sell, and use them, and that in his dealings with the defendants he required an agreement on their part that they would use them only in their own publications, and would not sell them, or multiply them for the purpose of selling them, in order that he might have the opportunity of selling the plates to other persons who might wish to use them in their publications, or might be able to protect persons to whom he had already sold the right to use the plates. It does not appear that the plates or the prints from them were protected, or could have been protected, by a copyright in the United States, but the plaintiff meant to accomplish much the same result, in requiring this agreement from the defendants, as could be reached under a copyright law by a license. It is not entirely clearfrom the agreement whether the plates were sold absolutely to the defendants, or were let to them to be used in a particular way. The prints, after they had been published, unless protected by a copyright, could be copied by any one, and plates could be engraved and electrotype plates made; but this would be a costly process when compared with that of multiplying the plates. that the evidence shows that the plates were sold to the defendants so that the title passed to them. The agreement on their part not to sell them to other parties, nor to multiply them for the purpose of selling, is in the nature of an agreement in restraint of trade. Considering the nature of the property, we are of opinion that such an agreement is reasonable, and one which ought to be enforced between the parties to it. See Publishing Co. v. Smythe, 27 Fed. 914; Clemens v. Estes, 22 Fed. 899; Parton v. Prang, 3 Cliff, 537, Fed. Cas. No. 10.784. The price to be paid for the plates, if they were to become the absolute property of the purchaser, without any restriction upon the use to be made of them, might reasonably be more than if they were purchased under such an agreement

as is the foundation of this suit. It must be considered that the title of Houghton, Mifflin & Co., and their right to use the plates, are unaffected by this agreement; and therefore it is impossible to say, on the facts and evidence reported, that the defendants are liable only in nominal damages." (pp. 685-686.)

Anthony v. Hitchcock, 71 Fed. 659 (C. Ct. Mich., Severens, D. J., 1896), held that a complaint for damages stated a cause of action. The plaintiff alleged that he conducted a coal and fish business at a dock on a navigable river; that he was the owner of adjoining land suitable for carrying on a similar business; that he sold the land to the defendant who agreed not to buy or sell coal or traffic in the buying or selling of fish, and not to do anything that would conflict with the coal or fish business of the plaintiff. Later, the defendant leased the property thus purchased to a firm of coal dealers for the purpose of carrying on a coal and fish business, in competition with that of the plaintiff, to his damage.

Held, that it could not be adjudged that the contract, as alleged, was contrary to public policy, as being in restraint of trade, and that, upon such declaration, it appeared that the plaintiff had a good cause of action.

In the course of the opinion it is said that

"the modern decisions seem to be settling down upon the test whether the restriction is one limited to the protection of the plaintiff's business. If it is, it is recognized as reasonable and lawful; and otherwise if not so limited." (p. 661.)

It is to be noted that the decisions speak of restrictions for the protection of the business of the seller. This language was employed in cases where the dominant idea was the protection of the business of the seller. In our case the position was unique. The restriction was requested by the Government with a view to the general welfare, but the restrictions are amply justified as appropriate to the protection of the business of the seller. The sugar company anticipating a shortage wished to secure as large a supply as possible wherewith to serve its clients and customers. This was calculated to promote its business reputation and maintain and enlarge the good-will of its business and any course which it took in that matter was clearly within its right, and in addition it served the public interests. Moreover, the sugar company had the lawful right to refuse to sell to any dealer in sugar and as incidental to that right was entitled to exact from any buyer an agreement that he would use the sugar in his own business or for his own needs and not for resale. (Raymond Bros.-Clark Co. v. Federal Trade Commission, 280 Fed. 529; C. C. A. 8th Ct. 1922.) In these circumstances, obviously the restriction could not be said to involve a violation of the anti-trust laws for they are designed to fit totally different situations.

"It was held in the Standard Oil Case [221 U. S. 1] that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or

which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance." (*United States v. American Tobacco Co.*, 221 U. S. 106, 179.)

"Those [the Standard Oil and Tobacco] cases may be taken to have established that only such contracts and combinations are within the act, as by reason of intent or the inherent nature of the contemplated acts, prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade, 221 U. S. 179." (Nash v. United States, 229 U. S. 373, 376.)

In considering the validity of clause 6 the following matters are to be taken into account:

- (a) The sugar company had the right to refuse to sell the sugar to any person except a manufacturer. (See authorities pp. 64-66.) The covenant of such a buyer that he would use the sugar for his manufacturing needs only and necessarily and consequently that he would not resell are mere incidents to enforce the right of the sugar company to sell to manufacturers only. All covenants incidental to the right of the sugar company to choose its own customers are necessarily lawful (280 Fed. 532, line 8).
- (b) There was nothing illegal or immoral in the objective of the clauses, i. e., there is nothing unlawful in the use of the sugar for manufacturing purposes only. The appellant's argument for illegality is that it restricted the buyer to one of several lawful uses of the commodity.

- (c) The restrictions were calculated to bring about economy in buying which would be most desirable in time of scarcity. A manufacturer who knew that he was purchasing only because he was a manufacturer and who had covenanted to use the sugar for his own manufacturing needs would see to it that he did not buy more sugar than would be absorbed in the operation of his business.
- (d) The supposititious results conjured up by the appellant have no place in this discussion. The contracts are to be judged by the circumstances which existed when they were made, not by unexpected events which later transpired nor by supposititious cases. "Legal puzzles which might well distract a theorist may easily be conceived." (Quoted in 67 Fed. 318.)
- (e) Restrictions on the use of commodities and on the use of real property are frequently but inaccurately spoken of as restraints of trade. Judges have had occasion to note that they are not properly described as restraints of trade and they are only called restraints of trade because there are analogies in the law relating to such restrictions and to true restraints of trade. The Sherman law deals with true restraints of trade and not with restrictions upon the use of property.
- (f) Throughout the discussion we speak of 10,000 tons as though that amount was involved in the transaction. The pleadings deal only with 1250 tons and the 10,000 tons merely came into the case at the final hearing. The plaintiff's case rests upon the idea that the contract would be invalid even if it only involved 10 tons.

- (g) There is a difference between illegality and unenforcibility. Some restrictions might be unenforcible because the detriment to the seller was too remote but that would not make them illegal nor infect a main contract to which they were mere incidents.
- (2) If the contract of sale and purchase here involved does not violate the Sherman law it does not violate any other law invoked by appellant. Moreover the contract does not violate any law whatever.

In the brief for appellant (pages 14 and 15) the appellant invokes the provisions in the Wilson Tariff Act of August 27, 1894 (28 St. 570), as amended February 12, 1913 (37 St. 667), as a law violated by this contract.

The effect of the Wilson Act is to apply the provisions of the Sherman law to trade between foreign countries and this country. If the contract in this case affecting a shipment from San Francisco to Chicago does not violate the Sherman law the contract would not have violated the Wilson Act even if the sugar had been imported by us from a foreign country. We might say in passing, although it is unimportant, that we were not the importers of this sugar but bought from those who did import. This is a matter of minor consequence, however, because as it has been decided that an agreement by a buyer to use a commodity purchased for his own needs does not violate the Sherman law, it is equally clear that it does not violate the Wilson Act.

There is nothing whatever in the Lever Act of which the contract is a violation. One of the fundamental ideas of the Lever Act was an equitable distribution of sugar, and, therefore, the spirit which underlies the Lever Act would have justified any right minded dealer in sugar under the circumstances of this case in insisting upon the covenant from the buyer which was required by the sugar company in respect of sales of the 10,000 tons of Java White sugar.

The complainant has not attacked the contracts here involved as violative of any law except an act of Congress. Complainant has not claimed that the contracts violated any statutory law of California or any unwritten law. If this clause violated California law the restriction would only be unlawful to the extent that the restraint was unreasonable and the main agreement would be legal and enforcible. (See Sections 1673, 1674, California Civil Code.)

(3) In the absence of a contract the sugar company was under no obligation whatever to sell sugar to the candy company and the latter was under no obligation to buy. In these circumstances, it was not illegal for them to agree, each with the other, that there should be no additional sales and purchases between them during the then current year.

Clause 7 of the contracts was as follows:

"7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year."

This clause was in effect an agreement between the parties that they would not deal between themselves for additional sugar within the current year. Each of the parties had power without this agreement to accomplish the same end for without the consent of both of them there could be no sale or purchase between them. In these circumstances, it was not illegal for them to agree that they would not deal with each other in respect of additional sugar during the then current year.

"Section 2 \* \* \* and provided further that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (The Clayton Act, approved October 15, 1914, 38 St. 730.)

"The (Sherman) Act does not restrict the longrecognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, ne may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business, and may sell to whom he pleases.' United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 320, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U.S. 600, 614. See also Standard Oil Co. v. United States. 221 U. S. 1, 56; United States v. American Tobacco Co. 221 U. S. 106, 180; Boston Store v. American Graphophone Co. 246 U. S. 8." (United States v. Colgate & Co., 250 U. S. 300, 307, 63 L. ed. 992, 997, 1919.)

"[In the Colgate case we held that] the only act charged amounted to the exercise of the right of the trader, or manufacturer, engaged in private business, to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell, and that thus interpreted no act was charged in the indictment which amounted to a violation of the Sherman Act prohibiting monopolies, contracts, combinations, and conspiracies in restraint of interstate commerce." (Federal Trade Commission v. Beech-Nut Packing Co., 42 Sup. Ct. 150, 154, column 1, top. 1922.)

"There was in that [the Colgate] case no evidence of a purpose to maintain a monopoly and restrain trade by means of restrictive agreements. In a word, all that was done by the decision in the Colgate case, as we read the opinion, was to preserve a producer's right of freedom to trade—lawfully." (Victor Co. v. Kemeny, 271 Fed. 810, 817, C. C. A. 3rd Ct. 1921.)

"It is the settled law that the individual dealer may select his own customers for reasons sufficient to himself, and he may refuse to deal with a proposed customer who he thinks is acting unfairly and is trying to undermine his trade." (Western Sugar Refinery Co. v. Federal Trade Commission, 275 Fed. 725, 733, C. C. A. 9th Ct. 1921.)

"In the conduct of its business [defendant Cream of Wheat Co.], decided and made announcement to the trade that for reasons sufficient to itself it would sell only to wholesalers. Why, if it chose to do so, it could not make such a rule and adhere to it, we are at a loss to understand. \* \* The Clayton Act itself expressly recognizes the existence of this right. Under the rule which defendant [Cream of Wheat Co.] had legitimately established for the conduct of its own business, complainant could not buy from it, because complainant was a retailer. \* \* There was no contract between the two which bound defendant [Cream of Wheat Co.] to

sell to complainant. \* \* \* We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice'. Cooley on Torts, p. 278." (Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48; C. C. A. 2nd Ct. 1915.)

"A wholesaler has the right to purchase merchandise or refuse to purchase it from any person he chooses, and for any reason, or no reason at all, and to refuse to make further purchases from a manufacturer, unless that manufacturer agrees to cease selling to another wholesaler, who was also engaged in the retail business, without being guilty of unfair methods of competition, contrary to the Federal Trade Commission Act." (Syl. Raymond Bros.-Clark Co. v. Federal Trade Commission, 280 Fed. 529; C. C. A. 8th Ct. 1922.)

(4) Considering the circumstances under which the contracts were made and the clauses introduced, there is no invalidity in either of them regardless of their validity when abstractly considered.

In support of this point we invite attention to the opinion rendered by Judge Bledsoe in deciding the case (270 Fed. 302, R. 90, 344), upon which the point might be safely rested. We add some suggestions, however.

In the present case there was no purpose to create a monopoly or to restrain trade. The object of the clauses under consideration was to secure an equitable distribution of sugar. Anticipating a shortage and also moved by strikes, etc. in the Hawaiian Islands calculating to reduce its importation of cane sugar from those islands, the sugar company imported this peculiar sugar in order that it might help to take care of the requirements of its customers.

The sugar company having in hand sugar peculiarly suited for use in the manufacture of commodities requiring sugar and not suited for household use, the right minded course for it to take was what the Government requested it to take—to sell this sugar only to manufacturers for their own use, thereby in part satisfying their sugar requirements and at the same time relieving the strain on sugar suited for household consumption. Such a course was calculated to promote the public welfare and to serve its own personal interests, i. e., the care of its customers during a period of shortage and its right to sell to manufacturers only.

The language of the Food Control Act and of the proclamations of the President and the regulations of the Government all called for the equitable distribution of commodities.

The testimony of Mrs. Adams, United States Attorney at San Francisco, shows that the course of the Government was quite in keeping with the public welfare, and the Attorney General's Report, 1920, pages 180 to 185, copied here (R. p. 308) shows that the provisions were called for by the exigencies respecting sugar.

It is clear that the acts here under review did not restrain trade within the meaning of the anti-trust decisions which have annulled contracts, agreements, combinations, etc., "which either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade" (supra p. 60), because "the evident purpose" of the acts here under review was not to restrain trade but to minimize the injury to the public due to a shortage of sugar. Unless, therefore, it can be shown that the contracts here involved injuriously restrained trade "because of their inherent nature or effect" there is nothing in the case. The telegram of the sugar company to its brokers sent May 5, 1920, explains the whole situation (supra p. 31) and conclusively shows that the inherent nature or effect of the contracts was not such as to injuriously restrain trade.

The Java White sugar was peculiarly adapted to the requirements of manufacturers. If the manufacturers could be induced to take that sugar and employ it for their own manufacturing needs there would be a larger amount of sugar available for sale through jobbers, retailers, etc., for household consumption. In these circumstances it was a duty which the sugar company owed to the public to sell this particular lot of sugar to manufacturers for their own manufacturing needs, if that was possible. It did so. The circumstances were ample justification for their so doing even if the motive had been merely to satisfy the request of the government in that particular. In such a case the motive would not limit the right which the sugar company had to impose the condition. As an owner of commodities it had the right to impose these conditions because the

disposition of the sugar in this particular way (a) enhanced the reputation of the sugar company as one having power to meet the needs of its customers in periods of scarcity, and (b) the sugar company was thus effecting a sale of a peculiar sugar to manufacturers to whose use this particular sugar was well There was a special price put upon the suited. Java White sugar by the sugar company—19.85 cents per pound, and the entire 10,000 pounds was sold at that price. Refined sugar was nearly three cents per pound higher. In thus making a special rate for the Java White sugar (a rate lower than the price of refined sugar) the sugar company was entitled to insist that the persons to whom it sold the sugar should use it for their own manufacturing needs and not for resale.

The primary purpose of the restriction against resale was to prevent the manufacturer from buying more than his manufacturing requirements. It is also to be kept in mind that when the contracts were made both parties were acting in good faith. The candy company bought because it believed it would need the amount of sugar for which it contracted during the ensuing year and did not regard itself as a dealer in sugar presently or potentially for if it had regarded itself as a dealer in sugar it would have taken out a license for which it did not apply until June 30, 1920.

The price fixing cases are not pertinent to the question here involved. In those cases a manufacturer of an article of general use, whether patented or not patented, put the article out in trade and it came into the hands of innumerable dealers to sell to the general pub-

lic. The manufacturer sought to stabilize his output by insisting that each dealer should sell the article for the same price. The courts held that this destroyed competition in respect of this article of general use in trade, or substantially impaired competition and therefore violated the anti-trust laws in those particular cases.

In this case the commodity was not put out in trade but was sold to be used for a particular purpose and when used for that particular purpose there was no restriction whatever upon trading in the commodity created by the manufacturer. The restriction was in the interest of the public, had to do with a passing phase, was prompted by a well thought out and entirely justifiable policy of the government and inflicted no injury upon anyone. Moreover, the commodity involved in this particular case was less than one thirty-second of one per cent. of the entire sugar trade of the country, and all the sugar that was put out under these restrictions amounted to less than one-fourth of one per cent. of the annual consumption of sugar in the country. In addition to this it was only 2.7% of the output of the sugar company. In these circumstances, the restrictions were justified in morals and in law.

(5) In view of their very nature and the circumstances under which they were introduced into the contracts, the clauses are separable and the contracts of purchase and sale were enforcible notwithstanding those clauses.

We submit that we have already shown that the circumstances under which these clauses were introduced, without more, made them reasonable in their nature and entirely valid.

We come now to a different point and that is that even if those clauses were invalid, nevertheless the very circumstances of the case make the clauses separable from the main purpose of the contract which was the purchase and sale of sugar. The buyer had been informed that the government had requested the introduction of these clauses into the contract and that the sugar company had inserted them in harmony with the purpose of the government which was to secure an equitable distribution of sugar. The candy company was well aware that that was not an integral part of the consideration by which the sugar company was actuated but was in designed harmony with a governmental request, in the economic soundness of which the sugar company concurred.

As we have already pointed out, clause 6 was not a condition to the sale; it was a mere covenant by the buyer for which there would be a remedy in damages only to the vendor. This clause and clause 7 were inserted in the contract at the request of the government (see telegram, supra, page 31), and as previously stated the candy company was aware of that fact (supra, page 33 top).

"Nothing is consideration that is not regarded as such by both parties." (Dougherty v. Salt, 227 N. Y. 220, 125 N. E. 94, 95 [1919] and cases cited.)

"The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not

encouraged by the cases." (Cincinnati Company v. Bay, 200 U. S. 179, 185.)

See also the following cases, which clearly demonstrate that the clauses are separable and that the contract is enforcible notwithstanding those clauses:

Oregon Steam Navigation Co. v. Winsor, 87 U. S. (20 Wall) 64;

Pacific Wharf and Storage Co. v. Standard American Dredging Company, 184 Cal. 21, 192 Pac. 847 (1920);

U. S. Consolidated Seeded Raisin Co. v. Griffen Co., 126 Fed. 364 (C. C. A. 9th Ct. 1903);

Hall Manufacturing Co. v. Western Steel andIron Works, 227 Fed. 588, 593 (C. C. A. 7thCt. 1915);

Hedges v. Frink, 174 Cal. 552 (1917);

McCall Co. v. Hughes, 102 Miss. 375, 59 So. 794 (1912);

McCall Co. v. Parsons etc. Co., 107 Miss. 865, 66 So. 274 (1914);

Packard v. Byrd, 73 S. C. 1, 51 S. E. 678 (1905);

Faist v. Dahl, 86 Neb. 669, 126 N. W. 84 (1910);

Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N. E. 834 (1920);

In re Johnson, 224 Fed. 180, 186 (D. Ct. Wash. 1915);

Central New York Tel. & Tel. Co. v. Averill, 199N. Y. 128, 92 N. E. 206 (1910);

Stratton v. Wilson, 170 Ky. 61, 185 S. W. 522 (1916).

(6) The contracts between the Chicago banks and the seller were independent of the contract between the buyer and the seller and even if the latter were ₄llegal there would be no illegality in the former.

In the fall of 1920 there was an epidemic of repudiation by the buyers of commodities contracted for in the spring and awaiting delivery in the late fall or early summer all due to a drop in price. Dishonor of obligations assumed such proportions that it took on the appearance of a national calamity and was dealt with in the financial and trade journals of the country as well as in the leading journals of general circulation in the country. The banking interests of the country endeavored to disassociate themselves from this epidemic of dishonor and gave wide circulation to the fact that if the documents of the seller were in order drafts upon letters of credit would be duly honored regardless of the position taken by buyers. This did not mean, of course, that banks would pay drafts drawn upon their letters of credit if the documents and drafts were not in order and in time, but that if they were in order and in time they would be paid even though there were arrangements between the sellers and the buyers which the latter were claiming had not been fulfilled by the former. position of the banks was based upon the proposition that the contract between the bank and the seller was a contract independent of and distinct from the contract between the seller and the buyer and that if the documents were in order the bank would pay and had a valid recourse over against the buyer. This brought

into striking relief the fact that when there is a sale of commodities there may be agreements between the sellers and the buyers which are not carried into the letters of credit, and the banks insisted that they stood upon the terms of their letters of credit.

"It is now well settled that the letter of credit is an entirely distinct contract from the underlying contract of sale, in aid of which it is issued. The bank is liable only upon its letter of credit and is not concerned with or bound to enforce any of the provisions of the sale contract, which are not incorporated in its letter of credit.

In a falling market, such as has recently prevailed, a buyer is tempted to seek some pretext for refusal to pay and a seller, who is unable to perform his contract, is equally tempted to make a shipment which does not comply with its provisions, in the hope that he may be paid under the letter of credit. These conditions make the position of a bank, which desires to carry out its credit contract in good faith, a very difficult one, since it is bound, at its peril, to determine correctly the respective rights of the buyer and seller under the letter of credit.

Scores of suits have recently been brought by buyers in New York against their vendors and the banks to enjoin the beneficiaries of their letters of credit from drawing drafts hereunder and to enjoin the banks from paying such drafts, if drawn. In none of these cases was this relief granted, the courts uniformly holding that the bank must pay in accordance with the terms of the letter of credit and that the buyer must look for his remedy to an action upon his contract of sale." ("Documentary Letters of Credit", Carl A. Mead, 22 Columbia Law Review, 297, 311, issue of April, 1922.)

"The authorities are uniform to the effect that this letter of credit constitutes the sole contract with the shipper and that the bank issuing the letter of credit has no concern with any question which may arise between the vendor and vendee of the merchandise for the purchase price for which the letter of credit was issued." [Citing cases.] (Lamborn v. Lake Shore Banking Co., 196 App. Div. 504, 506, 188 N. Y. Supp. 162, 163 (1921).

"The letter of credit upon which this action is based was a complete and independent contract between the plaintiff shipper and the defendant bank which issued it based upon a valuable consideration." [Citing cases.] (Doelger v. Battery Park National Bank, 201 App. Div. 515, 521, 194 N. Y. Supp. 582, 587 (1922).

"A bank issuing an irrevocable letter of credit at buyer's request, whereby it agreed to accept drafts attached to bills of lading drawn by seller, was in no way concerned with any contract existing between the buyer and seller, and, if buyer rejected goods, the bank's remedy was to sell the goods, and, if insufficient was realized thereon to cover its advances, it had recourse to the buyer for the difference, but could not recover from the seller." (Syl. Imbrie v. D. Nagase & Co., 196 App. Div. 380, 187 N. Y. Supp. 692 (1921).

"When the bank issued this letter of credit it did not purchase goods. It agreed to purchase documents, in the sense that it would pay on receipt of certain documents, which should conform in every respect with the requirements of the letter of credit. It was, of course, not concerned with the goods, but with the documents. It would gravely impair the business of issuing letters of credit, if banks were required to construe the documents involved and determine arguable questions.

"The only safe rule for a bank is to refuse to pay, if, by omitting, as here, a distinct and clearly ex-

pressed provision, the documents do not conform with the letter of credit. Bank of Montreal v. Recknagle, 109 N. Y. 482, 17 N. E. 217." (International Banking Corporation v. Irving National Bank, 274 Fed. 122, 125 (D. Ct. N. Y. 1921, Mayer, D. J.).

"This is an action to recover \* \* \* upon a draft drawn by the plaintiff [the seller] upon the defendant, [the bank] and presented to the latter for payment. \* \* \* Payment was refused for a reason presently to be stated. The draft was drawn pursuant to a letter of irrevocable export credit issued [to the plaintiff] by defendant. \* \* \*

The complaint alleges that the letter of credit was issued by defendant to plaintiff for a valuable consideration received by defendant, as an inducement to plaintiff to enter into and perform a contract for the sale of tin plate made between plaintiff [the seller] and the [buyer thereof] \* \* \* It also alleges that plaintiff duly sold and shipped to the [buyer] \* \* the merchandise above referred to, and the plaintiff duly presented its draft to the defendant at its New York office \* \* accompanied by bills of lading covering said shipment, issued to order, indorsed in blank, and invoices, all as required by the irrevocable letter of credit. \* \* \*

The defendant in its answer, in addition to a general denial, set up three affirmative defenses.

\* \* The second defense alleged that, by reason of federal prohibition of exports from the United States of tin plates, the performance of the contract between the plaintiff [seller] and the [buyer] \* \* became impossible of execution, inasmuch as the [buyer] \* \* was unable to obtain a license permitting the export of the merchandise within the time required by the contract.

\* \* \* \*

Letters of credit have long been known to the commercial law, and the principles which govern them are well established. \* \* \* These letters are general or special. They are general, if di-

rected to the writer's correspondents generally. They are special, if, as in the case at bar, they are addressed to some particular person. If the letter is addressed to a particular person, who advances goods or money on it in accordance with its tenor, the letter becomes an available promise in favor of the person making the advance. When acted on, and the advances made in accordance with its terms, a contract is created between the writer of the letter and the party who has acted upon it, upon which an action can be maintained. \* \* \*

The second defense, that the contract become impossible of execution, inasmuch as the [buyer] \* \* \* was unable to obtain a license from the United States government permitting the export of the tin plate, is wholly inconsequential. The liability of the bank on the letter of credit as agreed upon between plaintiff and defendant was absolute from the time it was issued, and it was quite immaterial whether the defendant could export the tin or not. The law is that a bank issuing a letter of credit like the one here involved cannot justify its refusal to honor its obligations by reason of the contract relations existing between the bank and its depositor [the buyer] \* \* \*.

There is but one vital question involved in this case. It is whether the letter of credit already set forth herein is a complete and independent contract between the plaintiff and the defendant. This court is satisfied that it is, and that by it the defendant gave authority to the plaintiff to draw upon it \* \* \* and impliedly promised to pay drafts so drawn, when accompanied by certain specific documents, to wit, the invoices and bills of lading, provided the drafts were drawn and

presented prior to the expiration of the credit. \* \*

The defendant in effect seeks to read into the contract a provision that the plaintiff's rights under the letter of credit should be subject to the superior right of the [buyer] \* \* \* to modify the contract which the bank had made with the plaintiff. We do not so understand the law."

(American Steel Co. v. Irving, 266 Fed. 41-44, C. C. A. 2nd Ct. 1920.)

"The plaintiff having failed to show the facts upon which the liability of the defendant on the guaranty depended, was not entitled to recover; and, if the defendant had paid the draft without its being in form showing compliance with the terms of the guaranty, and without the presentation of a bill of lading or shipping receipt issued by the express company showing shipment of eggs of the description specified in the guaranty, it might not have been able to recover of the drawees. (Bank of Montreal v. Recknagel, 109 N. Y. 482; Lamborn v. Lake Shore Banking & Trust Co., 196 App. Div. 504; affd. 231 N. Y. 616; Germania Nat. Bank v. Taaks, 101 id. 442; of Italy v. Merchants Nat. Bank, supra; International Banking Corp. v. Irving Nat. Bank, 274 Fed. Rep. 122.)" (Portuguese American Bank v. Atlantic National Bank, 200 App. Div. 575, 577, 193 N. Y. Supp. 423, 425 (1922).

See, also:

Frey & Son, Inc. v. E. R. Sherburne Co., 193 App. Div. 849, 184 N. Y. Supp. 661 (1920);

<sup>7</sup> The first trial resulted in a judgment for the defendant bank which was reversed in the above decision (266 Fed. 41). The second trial resulted in a judgment for the plaintiff steel company which was affirmed (277 Fed. 1016, C. C. A. 2nd Ct. 1921), and Certiorari denied (42 Sup. Ct. 271, 66 L. ed. 360, 1922).

Germania National Bank v. Taaks, 101 N. Y. 442, 5 N. E. 76 (1886);

Bank of Italy v. Merchants National Bank, 197 App. Div. 150, 152, 188 N. Y. Supp. 183, 184 (1921), affirming 113 Misc. 314, 185 N. Y. Supp. 43 (1921);

Bank of Taiwan v. Gorgas-Pierie Mfg. Co, 273 Fed. 660 (C. C. A. 3rd Ct. 1921);

Vaughn v. Massachusetts Hide Corporation, 209 Fed. 667 (D. Ct. Mass., Bingham, C. J., 1913);

Bank of Lumpkin v. People's Bank of Athens, 27 Ga. App. 459, 108 S. E. 835 (1921);

Bank of Plant City v. Canal-Commercial Bank, 270 Fed. 477, 481 (C. C. A. 5th Ct. 1921); Banks and Banking, 7 C. J. 594-595.

(7) If it were held that the contracts between seller and buyer were illegal and this illegality infected the contract between the Chicago banks and the seller, then the banks were under no obligation to honor drafts drawn under the letters of credit and if they honored such drafts the banks would be volunteers in respect of payments made, and would not have recourse against the candy company.

If the contract of purchase and sale were invalid, the plaintiff would have a full and complete defense to any action by the seller thereon for the price, and therefore, so far as the contract of purchase and sale is concerned, there is no equity in the bill.

"Where a party, if his theory of the controversy is correct, has a good defense at law to a purely legal demand," he should be left to that means of defense, as he has no occasion to resort

to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy." (Cable v. U. S. Life Ins. Co., 191 U. S. 288, 305 ft.)

## See, also:

Grand Chute v. Winegar, 82 U. S. (15 Wall.) 373 (1873);

Sunset Telephone Co. v. Williams, 162 Fed. 301 (C. C. A. 9th Ct. 1908).

Bronson v. Cook, 247 Fed. 601.

21 Corpus Juris 41.

Moreover, if we assume that the contracts of the banks were infected with any of the alleged illegality of the contracts of purchase and sale, then it follows that the banks had a full defense at law against the letters of credit, and that the candy company had a full defense against its contract with the banks if the banks paid.

In other words, if the contracts between the banks and the seller were infected with illegality the seller could not recover from the banks and therefore a payment by them was not obligatory but merely voluntary, and if voluntary, could not be the basis of a claim over against the buyer on his contract to reimburse the banks in respect of the letters of credit.

Payment (Voluntary): 21 R. C. L. 141; 22 A. & E. Eneye. of Law, (2nd Ed.) 609; 30 Cyc., 1298.

(8) Furthermore, considering that the Chicago banks paid the drafts and took over the shipping documents which made them the owners thereof, the case is at an end.

If we treat the contract between the banks and the seller (the sugar company) as a contract independent of and distinct from that between seller and buyer and therefore not infected with any supposed illegality in the latter contract; or consider the contract as infected and the payment by the banks voluntary and not compulsory, the case is at an end. In the latter circumstances the candy company would have been under no obligation to reimburse the banks, and therefore it could not obtain an injunction to prevent performance of a contract between the banks and the seller. The moment the banks paid the drafts and took the shipping documents they became the owners thereof (subject to the right of the buyer to take them over on reimbursing the banks). This is the point decided in Vaughan v. Mass. Hide Corporation, supra, page 79.

(9) As this was an action to annul a contract between the Chicago banks and the seller and as the Chicago banks were not impleaded in the cause there was an absence of indispensable parties—a point seasonably and properly made below.

Virginia Mining Co. v. Corrigan, 242 Fed. 809 (1917);

Foster's Federal Practice, 5th Ed., Vol. 1, secs. 120, 128;

Bogart v. Southern P. Co., 228 U. S. 136, 146-8 (1913);

Niles Co. v. Iron Moulders' Union, 254 U. S. 77, 65 L. Ed. 145, 41 Sup. Ct. Rep. 39 (1920).

(10) In no event would the candy company be permitted to reap the benefits of its unconscionable delay and to treat the contracts as valid while it desired the sugar and to treat them as illegal when it desired no longer to buy the sugar.

The contracts between seller and buyer in the present case were made May 14, 18, 1920. The repudiation took place December 1, 1920, although the so-called notice of rescission was dated November 30, 1920. The drop in the price of sugar commenced in the middle of July (Brown, R. 173, foot; also table of prices, R. 163). This was a world condition.

In Frederick v. American Sugar Refining Co., 281 Fed. 305 (C. C. A. 4th Ct. 1922) the purchase of sugar was made on May 28, 1920, at  $22\frac{1}{2}$  cents per pound (p. 305), and it was sold December 21 and 22nd, 1920, at 8 cents per pound (p. 306).

As an interesting instance of repudiation of sugar contracts in 1920, we invite attention to Franklin Sugar Refining Co. v. Hansoom, 273 Pa. 98, 116 Atl. 140 (1922) where the seller sued the buyer for breach of a contract to purchase and pay for sugar. When the contract was made the price was high, but as it called for September and October 1920 delivery, the price fell in the meantime. The buyer defended against the action and among other things alleged that:

"Plaintiff 'represented in substance to the trade, amongst others the defendant, that refined sugar was scarce, and that such scarcity of sugar would continue throughout the year 1920, that unless plaintiff allotted sugar to its customers pro rata, based on previous purchases, and delivered the same in accordance with such allotments, plain-

tiff's customers would not be able to get any sugar for the balance of the year 1920, and that the price of sugar would advance to 30 cents per pound before the end of the year; that plaintiff's said plan of making allotments was a new method of selling sugar, which was introduced and used by plaintiff and others controlling the sources of supply, for the express purpose of deceiving and taking advantage of the trade, amongst others defendant, by forcing and attempting to force abnormally large purchases of sugar at high and excessive prices'.'' (p. 142, column 2, top.)

After thus stating the substance of defendant's pleading, the court said:

"These allegations are of no value, because averred upon information and belief only, though made to defendant itself; are principally allegations of opinion and not of fact; and so far as they relate to the averment that the plan of making allotments was introduced for the purpose of deception, no fact is given to justify the opinion, and the method has not in itself anything from which the court could infer it. On the contrary, on its face it would appear to be a beneficial means for enabling old customers to assure themselves of a supply of sugar at a time three and four months distant, when the entire community was clamoring for it because the price had greatly advanced, and it was believed would continue so to do. Moreover. there is no averment that the alleged 'express purpose' was effective in defendant's case, in that by reason thereof it contracted for 'abnormally large purchases of sugar at high and excessive prices'. The affidavit of defense expressly admits that at this time 'sugar was in demand, and could have been sold by plaintiff, [and that] defendant did not indicate to plaintiff \* \* \* any unwillingness on defendant's part to take the sugar', and by failing to properly deny it admits also that 'plaintiff could not nearly meet the demands of the trade for the prospective output of its refinery'. Beyond this, however, defendant has only itself to blame \* \* \* if it was unwilling to buy unless protected against the possibility of a fall in price, it should have asked for a guaranty; doubtless it did not because it could not afford to take the risk of plaintiff's refusal to sell under such conditions, when it could easily have sold all the sugar obtainable, without making itself liable to market fluctuations.'' (p. 142, column 2.)

Other sugar cases arising out of the drop in price from the spring to the fall of 1920 are:

Franklin Sugar Refining Co. v. Howell (Pa.), 118 Atl. 109 (1922);

Kramer v. Harsch, 278 Fed. 860 (C. C. A. 3rd Ct. 1922);

Morris Joseloff Co. v. Spirt (Conn.), 117 Atl. 523 (1922);

Franklin Sugar Refining Co. v. Lykens Mercantile Co. (Pa.), 117 Atl. 780 (1922);

American Sugar Refining Co. v. Martin-Nelly Grocery Co. (W. Va.), 111 S. E. 759 (1922).

## (11) Conclusion.

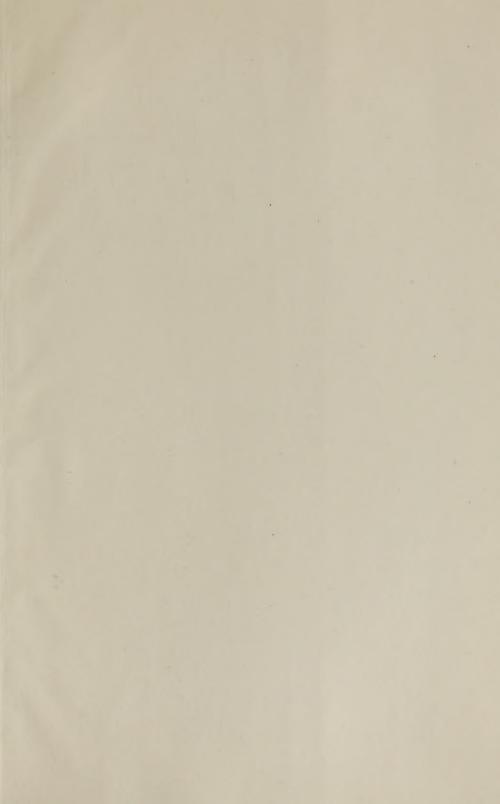
We respectfully submit that the decree below was in consonance with law and morals and should be affirmed.

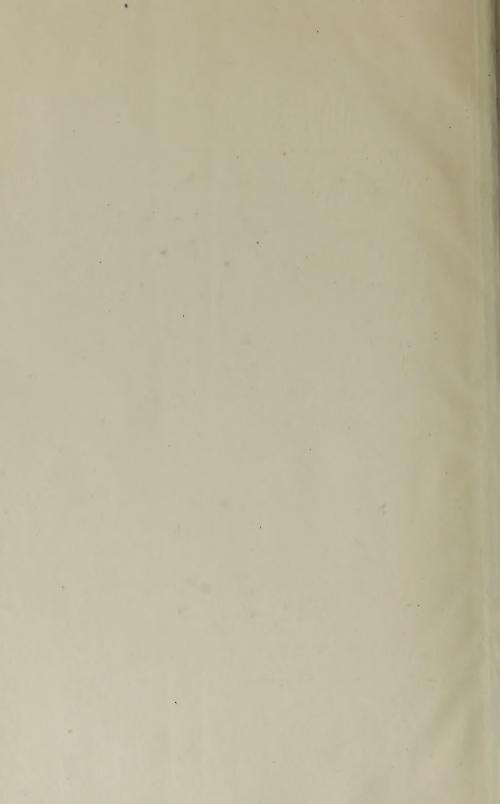
San Francisco, October, 1922.

Respectfully submitted,

Donald Y. Campbell,
Garret W. McEnerney,

Attorneys for Appellee Sugar Company.





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